RECORD AND BRIEFS

17-647

No. _____

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT; CARL S. FERRARO, Individually and in his Official Capacity as Scott Township Code Enforcement Officer,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court should reconsider the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-96 (1985), requiring property owners to exhaust state court remedies to ripen federal takings claims, as suggested by Justices of this Court? *See Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy, and Thomas, JJ., concurring in judgment).

Alternately, whether *Williamson County*'s ripeness doctrine bars review of takings claims asserting that a law causes an unconstitutional taking on its face, as the Sixth, Ninth, Tenth and now Third Circuits hold, or whether facial claims are exempt from *Williamson County*, as the First, Fourth, and Seventh Circuits hold?

LIST OF ALL PARTIES

The party to the judgment from which review is sought is Petitioner Rose Mary Knick. She was a party in all proceedings below.

Respondent is the Township of Scott, Pennsylvania.[1]

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[1] The case also originally named Carl S. Ferraro, Individually and in his Official Capacity as Scott Township Code Enforcement Officer. However, the district court dismissed this defendant and that judgment was not appealed.

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TABLE OF AUTHORITIES

Cases

Alto Eldorado Partnership v. County of Santa Fe, 634 F.3d 1170 (10th Cir. 2011) 28

Arrigoni Enters., LLC v. Town of Durham, 136 S. Ct. 1409 (2016) 2, 11-12, 15-20, 23-24, 31

Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza, 484 F.3d 1 (1st Cir. 2007) 25

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County Concrete Corp. v. Town of Roxbury, 442 F.3d 159 (3d Cir. 2006) 10

Del-Prairie Stock Farm, Inc. v. County of Walworth, 572 F. Supp. 2d 1031 (E.D. Wis. 2008) 3, 12, 21

DLX, Inc. v. Kentucky, 381 F.3d 511 (6th Cir. 2004) 15-17

Dolan v. City of Tigard, 512 U.S. 374 (1994) 13, 28

Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) 31

F.C.C. v. Florida Power Corp., 480 U.S. 245 (1987) 32

Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 14, 30, 32

Holliday Amusement Co. v. South Carolina, 493 F.3d 404 (4th Cir. 2007) 26

Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1913) 23

Horne v. Dep't of Agric., 569 U.S. 513, 133 S. Ct. 2053 (2013) 3, 21-22

International Union of Operating Engineers Local 139 v. Schimel, 863 F.3d 674 (7th Cir. 2017) 26

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 12, 14, 30-31

Knick v. Scott Township, No. 3:14-cv-2223, 2015 WL 6560647 (M.D. Pa. Oct. 29, 2015) 1

Knick v. Township of Scott, Pa., 862 F.3d 310 (3d Cir. 2017) 1

Koscielski v. City of Minneapolis, 435 F.3d 898 (8th Cir. 2006) 19

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) 12-13

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Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 13

Lynch v. Household Fin. Corp., 405 U.S. 538 (1972) 17

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Mitchum v. Foster, 407 U.S. 225 (1972) 17

Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978) 21

Monroe v. Pape, 365 U.S. 167 (1961) 18

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Muscarello v. Ogle County Bd. of Com'rs,
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Nollan v. California Coastal Commission,
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Opulent Life Church v. City of Holly Springs, Miss.,
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Patterson v. McLean Credit Union,
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Payne v. Tennessee, 501 U.S. 808 (1991) 23

Penn Central Transp. Co. v. New York City,
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Peters v. Village of Clifton,
498 F.3d 727 (7th Cir. 2007) 26, 30

Philip Morris, Inc. v. Reilly,
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Regional Rail Reorganization Act Cases,
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Rockstead v. City of Crystal Lake,
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Ruckelshaus v. Monsanto Co.,
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San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005) 2, 12, 16-18, 23, 30-31

Sansotta v. Town of Nags Head, 724 F.3d 533 (4th Cir. 2013) 19

Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) 20

Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401 (9th Cir. 1996) 27

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) 12, 15, 25, 30

Surf and Sand, LLC v. City of Capitola, 377 F. App'x 662 (9th Cir. 2010) 27

Swift & Co., Inc. v. Wickham, 382 U.S. 111 (1965) 23

Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach, Fla., 727 F.3d 1349 (11th Cir. 2013) 26

United States v. Dickinson, 331 U.S. 745 (1947) 21

Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura, 371 F.3d 1046 (9th Cir. 2004) 27

Wayside Church v. Van Buren County, 847 F.3d 812 (6th Cir. 2017) 2-3, 20

Wilkins v. Daniels, 744 F.3d 409 (6th Cir. 2014) 27

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 2, 14-15, 20, 29

Yee v. City of Escondido,
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United States Constitution

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Statutes

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Ordinance 12-12-20-001 § 2 (Dec. 20, 2012) 6-7

Ordinance 12-12-20-001 § 6 (Dec. 20, 2012) 7

Other Authorities

Berger, Michael M., *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*,
3 Wash. U. J.L. & Pol'y 99 (2000) 16

Berger, Michael M., *The Ripeness Game: Why Are We Still Forced to Play?*,
30 Touro L. Rev. 297 (2014) 24

Bloom, Frederic & Serkin, Christopher,
Suing Courts, 79 U. Chi. L. Rev. 553 (2012) 18

Crocker, Katherine Mims, *Justifying a Prudential Solution to the* Williamson County *Ripeness Puzzle*, 49 Ga. L. Rev. 163 (2014) 24-25

Hawley, Joshua D., *The Beginning of the End?* Horne v. Department of Agriculture *and the Future of* Williamson County, 2013 Cato Sup. Ct. Rev. 245 2

Kanner, Gideon, *"[Un]equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases,* 40 Loy. L.A. L. Rev. 1065 (2007)..... 22

Kassouni, Timothy V., *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights,* 29 Cal. W. L. Rev. 1 (1992) 21

Keller, Scott A., *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the* Williamson County *State Litigation Requirement for Regulatory Takings Claims,* 85 Tex. L. Rev. 199 (2006)..... 20

McConnell, Michael W., Horne *and the Normalization of Takings Litigation: A Response to Professor Echeverria,* 43 Envtl. L. Rep. News & Analysis 10749 (2013) 20

Monaghan, Henry Paul, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment,* 86 Colum. L. Rev. 979 (1986)..... 21-22

Preis, John F., *Alternative State Remedies in Constitutional Torts,* 40 Conn. L. Rev. 723 (Feb. 2008)..... 18

Salkin, Patricia E., *Zoning and Land Use Planning,* 39 Real Est. L.J. 526 (Spring 2011)..... 5

Smith, Craig, *Home burial on legislators' radar*, TribLive, Apr. 5, 2014, http://triblive.com/state/pennsylvania/5788717-74/burial-funeral-property 5

Zhou, David, Comment, *Rethinking the Facial Takings Claim*, 120 Yale L.J. 967 (2011) 29

PETITION FOR A WRIT OF CERTIORARI

Rose Mary Knick respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals is reported at *Knick v. Township of Scott, Pa.*, 862 F.3d 310 (3d Cir. 2017), and is attached here as Appendix (App.) A. The opinion of the district court is unpublished. It is attached here as App. B.[1]

JURISDICTION

This lower court had jurisdiction over this case under 28 U.S.C. § 1331, 42 U.S.C. § 1983, and the Fifth Amendment to the United States Constitution. The Court of Appeals for the Third Circuit entered final judgment on July 6, 2017. App. C. This Court granted an extension to file the Petition for Certiorari to and including Nov. 1, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTITIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

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[1] The district court issued a prior decision dealing with claims not at issue here. It is available at *Knick v. Scott Township*, No. 3:14-cv-2223, 2015 WL 6560647 (M.D. Pa. Oct. 29, 2015).

INTRODUCTION

This case raises important questions relating to the viability and reach of the highly criticized principle, arising from *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-96 (1985), that property owners must unsuccessfully seek compensation in state court before suing for an unconstitutional taking in federal court.

Due to its dysfunctional impact and questionable foundation, individual Justices of this Court have strongly questioned the propriety of the "state litigation" doctrine, and argued that it should be reconsidered. *See Arrigoni Enters., LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., dissenting from denial of certiorari); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 349 (2005) (Rehnquist, C.J., concurring in judgment). The desire to reconsider the case is well warranted. *Williamson County* has caused more injustice and conflict in federal takings litigation than any other takings principle. Joshua D. Hawley, *The Beginning of the End?* Horne v. Department of Agriculture *and the Future of* Williamson County, 2013 Cato Sup. Ct. Rev. 245, 247 (*Williamson County* introduced "distortions and doctrinal anomalies up and down the length of takings law"). Through its interaction with claim and issue preclusion and removal jurisdiction, the state litigation ripeness rule deprives property owners of reasonable judicial access for a takings claim, impedes the orderly development of takings law, and causes a tremendous waste of judicial and litigant resources. *Wayside Church v. Van Buren County*, 847 F.3d 812, 825 (6th Cir. 2017)

(Kethledge, J., dissenting) ("[I]f anyone has undermined the adjudication of federal takings claims against states and local governments, it is the federal courts—by the application of *Williamson County*.").

Moreover, *Williamson County*'s state litigation rule is flawed at the foundation. The decision suggests an alleged taking is not complete until it is "without just compensation," a relatively unremarkable concept. But it goes on to conclude that a lack of compensation is not apparent until a state *court* confirms it. It is wrong and unprecedented to make the absence of compensation depend on what a state court does, rather than what the executive or legislative agency responsible for the taking does. *Horne v. Dep't of Agric.*, 569 U.S. 513, 133 S. Ct. 2053, 2062 n.6 (2013) ("A 'Case' or 'Controversy' exists once the government has taken private property without paying for it."); *Del-Prairie Stock Farm, Inc. v. County of Walworth*, 572 F. Supp. 2d 1031, 1033 (E.D. Wis. 2008) ("[A] concrete takings injury can occur without state litigation.").

Despite its practical and doctrinal flaws, federal courts have been forced to grapple with *Williamson County*'s state litigation rule for many years. In so doing, they have come into conflict on the application of the rule in several contexts. Most importantly, the courts are in stark and broad conflict on whether the state litigation rule applies to "facial" takings claims. This common type of takings claim asserts that a taking arises from the plain and express terms of a law, rather than through application of the law to specific properties and facts. At least three circuits have held that *Williamson County* does not apply to such facial claims. But, in this case, the Third Circuit

adopted a contrary conclusion, in conflict with circuits holding that facial claims are not subject to *Williamson County*. App. A at 21-28. The decision also conflicts with this Court's precedent.

It is imperative that the Court reconsider *Williamson County*. This case presents a clean vehicle for doing so. The Township passed and implemented an ordinance that mandates public access to Ms. Knick's rural land, App. A at 3-4, a burden that abridges her fundamental right to exclude others and which violates this Court's physical takings precedent. *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987). The challenged law includes no promise of compensation or mechanism for promptly providing it. Ms. Knick accordingly challenged the constitutionality of the ordinance in state court, but was turned away on procedural grounds. So she came to federal court. The Third Circuit recognized the serious and concrete nature of Ms. Knick's claims. App. A at 3. Yet, it held that, under *Williamson County*, federal courts cannot decide the straightforward issue of whether the ordinance unconstitutionally invades private property unless Ms. Knick goes through further state court procedures. *Id.*

The Court should review this case to decide whether *Williamson County* correctly directs takings claimants to exhaust state court remedies to ripen takings review or to resolve the conflict among the courts on whether *Williamson County* applies to facial takings claims.

STATEMENT OF THE CASE

This case arises from a dispute in rural, western Pennsylvania over an ordinance mandating public and governmental access to private property containing burial grounds. Pennsylvania has never had a state law prohibiting so-called "backyard burials," the practice of burying the deceased on private property. *See* Patricia E. Salkin, *Zoning and Land Use Planning*, 39 Real Est. L.J. 526, 530 (Spring 2011). As a result, it is common to find private, family gravesites in the state. *See id.*; *see also* Craig Smith, *Home burial on legislators' radar*, TribLive, Apr. 5, 2014, http://triblive.com/state/pennsylvania/5788717-74/burial-funeral-property (noting "[t]he practice of tending to one's dead is not new, as evidenced by the number of centuries-old burial sites with time-worn tombstones on private properties throughout Western Pennsylvania"). As counsel for Respondent Scott Township explained below, the Township itself "goes back several hundred years in terms of families and burial plots. So while these may not be . . . sprawling cemeteries, you will have small plots that families have maintained for years." District Court Hearing Transcript at 5:3-6.

A. Factual Background

1. Ms. Knick's Property

Ms. Knick and her family have owned 90 acres of land in the Township since 1970. App. B at 2. The parcel is located at 49 Country Club Road, Scott Township, Pennsylvania. It is bisected by a road, and delineated on all sides by stonewalls, fences, and other markers. Signs stating "No Trespassing" exist at regular intervals on the boundary. *Id.*

Ms. Knick lives on the property in a single-family residence. *Id.* She uses much of the surrounding land as a grazing area for horses and other animals. *Id.* There is no public cemetery or public access easement on the land. Ms. Knick has never authorized the public to cross or otherwise use her land.

2. The Challenged Cemetery Access Ordinance

In September, 2008, in apparent response to a public inquiry, Scott Township officials discussed an alleged ancient burial ground on Ms. Knick's property. App. B. at 3. In 2008 and early 2009, Ms. Knick informed the Township that her title does not identify a burial ground. After additional research, she informed the Township that there is no official state registration or documentation of a cemetery. Knick also declared that she was not aware of any physical sign of a burial ground. *Id.*

In December of 2012, the Township enacted a first-of-its-kind law dealing with private cemeteries, Ordinance 12-12-20-001. App. A at 3. The Ordinance purports to regulate the existence, operation, and maintenance of cemeteries. *Id.* at 3-4.

Two of its provisions are relevant here. First, Section 5 requires that "[a]ll cemeteries . . . shall be kept open and accessible to the general public during daylight hours." App. A at 3. A "cemetery" is defined as "[a] place or area of ground, whether contained on private or public property, which has been set apart for or otherwise utilized as a burial place for deceased human beings." Ordinance 12-12-20-001 § 1(c) (Dec. 20, 2012). The Ordinance's provisions pertain to "[a]ll cemeteries, whether private or public, and

whether existing or established prior to the . . . Ordinance." *Id.* § 2.

At a district court hearing, the Township explained that the Ordinance's public access provision imposes a right-of-way into private land from the nearest public road. Transcript at 17:6-9. It also confirmed that this right of access is for the general public, and that anyone can use it, whether local or not. Transcript at 18:11-17 (the provision "does not limit who specifically should be permitted on to that property").

A different provision of the Ordinance authorizes the Township's "code enforcement" agents to "enter upon any property within the Township for the purposes of determining the existence of and location of any cemetery . . . ." App. A at 4 (quoting Ordinance 12-12-20-001 § 6).

The subject Ordinance authorizes fines of $300-$600 for every violation of its provisions, plus all court costs, including attorney fees. Each day that a violation exists is deemed a separate offense. App. A at 4.

3. Enforcement of the Ordinance Against Ms. Knick

On April 10, 2013, after enactment of the Ordinance, the Township's Code Enforcement Officer entered Ms. Knick's land without her consent. *Id.* One day later, the Township issued a Notice of Violation decreeing that the inspection of her land identified "[m]ultiple grave markers/tombstones" on the property. JA at 267. The Notice described the problem as "stones located on your property" and declared that

the alleged area constituted a "cemetery" subject to the Ordinance. *Id.*

The Notice ultimately stated that Ms. Knick was "in violation of section #5 of the ordinance which requires that all cemeteries within the Township shall be kept open and accessible to the general public during daylight hours," and directed her "to make access to the cemetery available to the public during daylight hours" as required by the ordinance. App. B at 3-4, JA at 267-68. On October 31, 2014, the Township issued a second, almost identical Notice of Violation. App. A at 5. It too commanded Ms. Knick to "make access to the cemetery available to the public."

B. State Court Procedure

On May 7, 2013, after the Township issued the first Notice of Violation, Ms. Knick filed a Complaint in the Pennsylvania Court of Common Pleas seeking Declaratory and Injunctive Relief from the Ordinance. App. A at 4. This state court complaint raised state constitutional challenges, including a takings claim. The Township then agreed to withdraw its April 11, 2013, Notice of Violation and to stay enforcement of the Ordinance.

The state court subsequently refused to rule on Ms. Knick's claims, finding they would "not [be] in the proper posture" for a decision until the Township filed a civil enforcement action against Ms. Knick. App. A at 4-5

C. District Court Procedure

At this point, Ms. Knick turned to the federal district court. App. A at 5. She filed a complaint alleging that the Ordinance violated the Fourth Amendment and the Takings Clause of the Fifth

Amendment, as enforced through 42 U.S.C. § 1983. *Id.* The claims sought equitable relief and damages. *Id.* at 6.

On October 28, 2015, the district court granted the Township's motion to dismiss the claims in an unpublished decision. *Id.* However, the district court granted Ms. Knick leave to re-plead some of her claims, including the takings claims, with more specificity.

Ms. Knick then filed a Second Amended Complaint. *Id.* That complaint made clear that her federal takings claims consisted of facial and as-applied claims against the Ordinance's access provisions.

On September 7, 2016, the district court issued an order dismissing all of Ms. Knick's re-pled takings claims. App. B at 11-18. The Court held that the claims were unripe under *Williamson County* until Ms. Knick prosecuted a new "inverse condemnation" action in state court. *Id.* Ms. Knick timely appealed to the Third Circuit.

D. The Third Circuit Decision

At the Third Circuit, Ms. Knick argued that the district erred in dismissing her facial Fourth Amendment claims and in dismissing her facial and as-applied federal takings claims. Only the latter claims are at issue here.

In a published decision, the Third Circuit upheld the lower court's dismissal of Ms. Knick's physical takings claims for lack of ripeness under *Williamson County*. In considering the facial claim, the Third Circuit reviewed and interpreted this Court's precedent. App. A at 22-25. It concluded that this

Court's decisions allow immediate federal review of a facial claim (i.e., without state litigation) only if it asserts the now-defunct theory that a regulation "fails to substantially advance a legitimate state interest." *Id.* at 24-25. It reasoned that this was because such a claim does not invoke the principle of "just compensation." *Id.*

Building on this understanding, the Third Circuit concluded that *Williamson County* is inapplicable when a claim invokes the Public Use Clause of the Fifth Amendment or the Due Process Clause. App. A at 26 (if "the plaintiff challenges the underlying validity of the taking, perhaps for lacking a public purpose or for violating due process, then the denial of compensation is irrelevant to the existence of a ripe claim and *Williamson County*'s second prong is inapplicable."). But, the lower court ruled, basic physical and regulatory takings claims are not excepted from *Williamson County*'s state litigation requirement because they implicate the "Just Compensation Clause." *Id.* at 24, 26-27. The court accordingly affirmed a prior Third Circuit decision holding that a facial taking claim alleging a denial of all economic use of property was subject to *Williamson County*'s state court procedures ripeness doctrine. *Id.* at 24-25 (affirming *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159 (3d Cir. 2006)). It ultimately held that Ms. Knick's facial takings claims challenging the ordinance as a physical occupation of property are subject to *Williamson County*, and unripe until Knick prosecutes a (second) state court lawsuit. App. A at 27-28.

As to Ms. Knick's as-applied takings claims, the Third Circuit held that these claims were also unripe

under *Williamson County* until Ms. Knick filed and finished a state court inverse condemnation action. *Id.* at 28-32. Although the lower court concluded that it had authority, under this Court's precedent, to waive the state litigation ripeness requirement for prudential reasons, it declined to do so for Ms. Knick. *Id.*

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision raises an important question as to whether the Court should reconsider and overrule *Williamson County*'s state litigation ripeness doctrine. *Arrigoni*, 136 S. Ct. 1409 (Thomas, J., dissenting from denial of certiorari). The decision also highlights and exacerbates a conflict among the circuit courts on whether typical facial takings claims—claims alleging that a law destroys the economic use of property or causes a physical invasion—are ripe without exhaustion of state court procedures.

While the Third Circuit decision applying *Williamson County*'s state litigation rule to facial physical and regulatory takings claims is consistent with the decisions of the Sixth, Ninth, and Tenth Circuits, it conflicts with decisions from the First, Fourth, and Seventh Circuits. Because of *Williamson County*'s preclusive effect on judicial review, *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of certiorari), the conflict on facial claims dramatically impacts the ability of property owners to challenge restrictive laws on a facial basis.

Finally, the Third Circuit's treatment of facial takings claims is also inconsistent with this Court's precedent. That precedent has repeatedly indicated

that facial takings claims are ripe upon enactment of the challenged law, without respect to state court procedures. *See, e.g., Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987). The decision below holds to the contrary. For all these reasons, the Court should grant the Petition.

I.

THE DECISION BELOW RAISES THE IMPORTANT QUESTION OF WHETHER THE COURT SHOULD RECONSIDER *WILLIAMSON COUNTY*'S STATE LITIGATION RIPENESS REQUIREMENT

The Court has identified a number of tests for determining when the government causes a taking of property without just compensation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-42 (2005). Unfortunately, *Williamson County*'s demand for a state court lawsuit prior to the assertion of a federal takings claim takes much of the bite out of this Court's tests by destroying claims at an early stage. *San Remo Hotel*, 545 U.S. at 352 (Rehnquist. C.J., concurring); *Del-Prairie Stock Farm*, 572 F. Supp. 2d at 1032 (The state litigation doctrine "has led to a number of serious problems."). To add insult to injury, it is now clear that the state litigation rule underlying this regressive system lacks any compelling doctrinal justification. *Arrigoni*, 136 S. Ct. at 1409-10 (Thomas, J., dissenting from denial of certiorari). The Court should take this case to reconsider, and overrule, *Williamson County*'s state litigation ripeness principle.

A. Relevant Legal Background

1. Takings Standards

This Court has held that a person may challenge governmental action as an unconstitutional taking of private property on several different grounds. *Lingle*, 544 U.S. at 538-42. Most simply, one may assert that the government causes a *per se* taking by authorizing a "physical invasion" of property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-33 (1982). One may also challenge land use and other regulations as a "regulatory taking" on the basis that they harm the use and value of private property. There are two theories for doing so. First, one may allege that a regulation deprives property of "all economically beneficial use." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). Second, under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), a property owner may contend that a regulation that does not deny all economic use of property still causes a taking due to its overall, adverse economic impact. *Id.* at 124. Finally, a special unconstitutional conditions-related test allows a land use applicant to challenge development permit conditions on the basis that there is no reasonable relationship between the condition and development. *Nollan*, 483 U.S. at 831-32; *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

Prior to 2005, this Court recognized an additional takings test. Specifically, a property owner could establish a taking by showing that a regulation "fails to substantially advance a legitimate state interest[s]." *Lingle*, 544 U.S. at 540-44. However, in 2005, the *Lingle* decision abrogated this test. *Id.* at 545.

that facial takings claims are ripe upon enactment of the challenged law, without respect to state court procedures. *See, e.g., Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987). The decision below holds to the contrary. For all these reasons, the Court should grant the Petition.

I.

THE DECISION BELOW RAISES THE IMPORTANT QUESTION OF WHETHER THE COURT SHOULD RECONSIDER *WILLIAMSON COUNTY*'S STATE LITIGATION RIPENESS REQUIREMENT

The Court has identified a number of tests for determining when the government causes a taking of property without just compensation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-42 (2005). Unfortunately, *Williamson County*'s demand for a state court lawsuit prior to the assertion of a federal takings claim takes much of the bite out of this Court's tests by destroying claims at an early stage. *San Remo Hotel*, 545 U.S. at 352 (Rehnquist. C.J., concurring); *Del-Prairie Stock Farm*, 572 F. Supp. 2d at 1032 (The state litigation doctrine "has led to a number of serious problems."). To add insult to injury, it is now clear that the state litigation rule underlying this regressive system lacks any compelling doctrinal justification. *Arrigoni*, 136 S. Ct. at 1409-10 (Thomas, J., dissenting from denial of certiorari). The Court should take this case to reconsider, and overrule, *Williamson County*'s state litigation ripeness principle.

A. Relevant Legal Background

1. Takings Standards

This Court has held that a person may challenge governmental action as an unconstitutional taking of private property on several different grounds. *Lingle*, 544 U.S. at 538-42. Most simply, one may assert that the government causes a *per se* taking by authorizing a "physical invasion" of property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-33 (1982). One may also challenge land use and other regulations as a "regulatory taking" on the basis that they harm the use and value of private property. There are two theories for doing so. First, one may allege that a regulation deprives property of "all economically beneficial use." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). Second, under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), a property owner may contend that a regulation that does not deny all economic use of property still causes a taking due to its overall, adverse economic impact. *Id.* at 124. Finally, a special unconstitutional conditions-related test allows a land use applicant to challenge development permit conditions on the basis that there is no reasonable relationship between the condition and development. *Nollan*, 483 U.S. at 831-32; *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

Prior to 2005, this Court recognized an additional takings test. Specifically, a property owner could establish a taking by showing that a regulation "fails to substantially advance a legitimate state interest[s]." *Lingle*, 544 U.S. at 540-44. However, in 2005, the *Lingle* decision abrogated this test. *Id.* at 545.

Takings claimants generally may raise a claim under any existing test on a facial or "as-applied" basis. In a facial challenge, the plaintiff alleges that simple "enactment of a [law] constitutes a taking." *Keystone*, 480 U.S. at 494. Such a claim does not depend on the particular nature of the claimant's property or other fact-specific circumstances; the focus is on the text of the law. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296-97 (1981). Conversely, in an as-applied challenge, the claimant asserts that the law results in a taking as applied to a particular set of facts. *Id.*

2. *Williamson County*

In *Williamson County*, this Court considered a claim that land use regulations resulted in a denial of valuable economic use, as applied to the property at issue. 473 U.S. at 186-90. The Court initially held that the claim was unripe because the local government had not reached a "final decision" on application of the subject regulations to the plaintiff's property. *Id.* at 192-94.

Although this final decision ruling should have ended the case, the *Williamson County* Court went on in dicta to articulate and apply a second ripeness hurdle. Specifically, the Court stated that a takings claim will not ripen until the claimant unsuccessfully "seek[s] compensation through the procedures the State has provided for doing so." *Id.* at 194. The *Williamson County* Court reasoned that the Fifth Amendment is violated only when a takings occurs "without just compensation." *Id.* at 194-96. From there, the Court concluded that a property owner must seek and be denied compensation in state court before a federal takings claim accrues. *Id.* The Court

ultimately held that the claim in *Williamson County* was not ripe because the plaintiff had not filed a state court action seeking compensation under Tennessee's inverse condemnation statute. *Id.*

Since *Williamson County*, the Court has clarified that the "state litigation" ripeness doctrine is a prudential and not jurisdictional principle. *Suitum*, 520 U.S. at 733-34.

B. The Only Function of the State Litigation Rule Is To Confuse, Delay, and Destroy Takings Claims

Although *Williamson County* presented the "state litigation" requirement as a temporary hurdle to review of takings claims in federal court, 473 U.S. at 185, it has operated as a permanent barrier. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 521 (6th Cir. 2004) ("The barring of the federal courthouse door to takings litigants seems an unanticipated effect of *Williamson County* . . . ."). Indeed, in practice, the rule often forecloses both federal and state court review. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.).

1. Preclusion Rules Bar Federal Review of *Williamson County*-Ripened Takings Claims and Limits Takings Suits to State Court

The most well-known problem associated with *Williamson County* arises from the tension between the state court litigation ripeness rule and the Full Faith and Credit statute.[2] The statute "obliges federal

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[2] 28 U.S.C. § 1738.

courts to give the same preclusive effect to a state-court judgment as would the courts of the State rendering the judgment." *McDonald v. City of West Branch*, 466 U.S. 284, 287 (1984). While *Williamson County* says that takings claims ripen for federal review after state court litigation, the Full Faith and Credit statute bars federal courts from hearing a case after a related state court suit. *San Remo*, 545 U.S. at 336 & n.16.

Accordingly, when a plaintiff unsuccessfully litigates for compensation in state court to comply with *Williamson*, any takings claim ripened by this process is impermissible in federal court because of preclusion barriers. *See San Remo*, 545 U.S. at 346-47. *Arrigoni*, 136 S. Ct. at 1410 (Thomas, J., dissenting from denial of cert.); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J.L. & Pol'y 99, 102 (2000) ("[T]he very act of ripening a case also ends it."). As the Sixth Circuit explained:

> The availability of federal courts to hear federal constitutional takings claims has often seemed illusory, because under *Williamson County* takings plaintiffs must first file in state court . . . before filing a federal claim, and because in deciding that federal claim, preclusive effect must be given to that prior state-court action under [Section 1738] according to the res judicata law of the state, including the doctrines of

> merger and bar whereby all claims which could have been brought in an earlier cause of action are precluded.

DLX, Inc., 381 F.3d at 519-20 (footnote omitted).

In *San Remo Hotel*, this Court refused to correct this situation by creating an exception from federal preclusion rules for takings cases ripened in state court under *Williamson County*. As a result, far from maturing takings claims for federal review, the state litigation doctrine works to totally deprive federal courts of jurisdiction over the Takings Clause. 545 U.S. at 349-52 (Rehnquist, C.J., concurring). It strips property owners of their ability (exercised for the previous century) to protect their property in federal court under Section 1983 and prevents federal courts from participating in the review and development of Fifth Amendment takings law. *Arrigoni*, 136 S. Ct. at 1410 (Thomas, J., dissenting from denial of cert.) (after *San Remo*, the state litigation rule "dooms plaintiffs' efforts to obtain federal review of a federal constitutional claim"). This cannot be reconciled with Congressional intent to provide citizens with a federal forum for federal civil rights violations. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) (Congress "intended to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law."); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of [42 U.S.C.] § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . .").

Indeed, this Court has considered the availability of a federal forum to be so important that it has long allowed constitutional plaintiffs to invoke federal

protection regardless of state remedies. *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."). Only takings plaintiffs are different, thanks to *Williamson County*. In creating a state court exhaustion barrier to federal review of takings claims, *Williamson County* radically departs from core premises of the modern judicial system. John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 Conn. L. Rev. 723, 726 (Feb. 2008) (*Williamson County* represents "a marked change from past practice.").

2. *Williamson County*'s Interaction with Removal Often Prevents State Court Review

Despite all this, one might think that *Williamson County* at least leaves takings plaintiffs with a state court avenue for their claims. *San Remo Hotel*, 545 U.S. at 346; Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. Chi. L. Rev. 553, 605 (2012) ("State courts thus get first bite at these [takings] actions under *Williamson County*—and they get the only bite under *San Remo*."). But the state court option is often also illusory due to another problem with the state litigation ripeness doctrine: its conflict with the principle that a government defendant may remove certain cases from state court to federal court. *See* 28 U.S.C. § 1441; *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.).

Given that *Williamson County* frustrates initial federal court review and creates a preclusion bar to post-state court review, plaintiffs generally must file their federal takings claim in state court or not at all.

Rockstead v. City of Crystal Lake, 486 F.3d 963, 968 (7th Cir. 2007). But doing so subjects the entire complaint to prompt removal to the federal court on the basis that it raises a "federal question." *See, e.g.*, *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013). Removal prevents state court litigation, and renders the removed claim unripe in the new federal forum under *Williamson County*. Thus, a federal court facing a removed takings claim will typically dismiss the claim because state procedures were not exhausted. *Id.*; *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.); *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903 (8th Cir. 2006) (approving of the dismissal of a removed takings claim for lack of finished state court procedures).

The combined effect of these "anomalies" is to leave many federal takings plaintiffs without any access to the courts. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of certiorari). They can't go to federal court due to *Williamson County* and many cannot go through state court due to the removal/ripeness game. Ultimately, plaintiffs may have to choose to forego their constitutional rights under the Takings Clause—in order to secure prompt review in some court under a non-takings theory—or try and brave the unpredictable and draining *Williamson County* maze.

What a mess. The Constitution requires a "reasonable, certain and adequate provision for obtaining compensation." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974) (quoting *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659 (1890)). But this is exactly what *Williamson*

County's state litigation rule prevents. It creates a chaotic and unworkable system for adjudicating federal takings claims, *Wayside Church*, 847 F.3d at 825 (Kethledge, J., dissenting) (application of *Williamson County* "has undermined the adjudication of federal takings claims against states and local governments"), one that cries out for this Court's intervention. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (reconsideration of precedent justified "when governing decisions are unworkable"); Scott A. Keller, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the* Williamson County *State Litigation Requirement for Regulatory Takings Claims*, 85 Tex. L. Rev. 199, 240 (2006) ("[T]he *Williamson County* State Litigation prong should be reconsidered and eliminated.").

C. *Williamson County*'s State Litigation Requirement Is Doctrinally Flawed and Entirely Unnecessary

The problems flowing from *Williamson County*'s state litigation doctrine are especially troubling because the doctrine is incorrect. *Arrigoni*, 136 S. Ct. at 1410 (Thomas, J., dissenting from denial of certiorari); Michael W. McConnell, Horne *and the Normalization of Takings Litigation: A Response to Professor Echeverria*, 43 Envtl. L. Rep. News & Analysis 10749 (2013) (noting that the state litigation concept in "*Williamson County* . . . cannot be correct, at least on its own terms"). As noted above, *Williamson County* declares that a taking is not "without just compensation" and complete until a state *court* confirms lack of compensation. 473 U.S. at 196. This makes no sense.

In almost all takings cases, the state court is not the government body taking property, nor does it bear compensatory liability for a taking. These qualities fall on the shoulders of the executive or legislative agency responsible for invading private property. *See generally, Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 690-92 (1978); *United States v. Dickinson*, 331 U.S. 745, 751 (1947) ("[T]he land was taken when it was taken and an obligation to pay for it then arose."). It is the acts and omissions of the body taking the property that should determine if the taking is uncompensated. *See* Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1, 43 (1992) ("[I]t makes little sense to require property owners to seek just compensation from the courts, as opposed to the governmental entity which imposed the regulation."). If a local or state entity makes a final decision regulating or invading property without offering or guaranteeing compensation, the taking is "without just compensation" and crystalized. *Horne*, 133 S. Ct. at 2062 n.6 (A takings "'Case' or 'Controversy' exists once the government has taken private property without paying for it.").

Requiring state court litigation in such a case adds nothing to the factual or legal sufficiency of a takings claim. *Id.* ("whether an alternative remedy exists does not affect the jurisdiction of the federal court"); *Del Prairie Stock Farm*, 572 F. Supp. 2d at 1033 ("a concrete takings injury can occur without state litigation"); Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 Colum. L. Rev. 979, 989 (1986) ("No authority supports use of ripeness doctrine to bar federal judicial consideration of an otherwise

sufficiently focused controversy simply because corrective state judicial process had not been invoked."). It simply imposes an unnecessary and jurisdictionally disastrous exhaustion of state remedies rule. Gideon Kanner, *"[Un]equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 Loy. L.A. L. Rev. 1065, 1077-78 (2007).

This case provides an example of how *Williamson County* prevents adjudication of claims already fit for review. There is no dispute here that the Township formally and finally enacted an ordinance that, on its plain terms, authorizes the public and the Township to physically occupy Ms. Knick's land, a quintessential physical taking. It is clear that the Township enforced these provisions against Ms. Knick, informing her that failure to open her land to the public violates the ordinance and commanding her to provide public access. App. A at 3-5. Finally, the Township has not paid or offered compensation to Ms. Knick, and neither the challenged Ordinance nor any other Township law contains a provision guaranteeing compensation. The Township actions against Ms. Knick are "without just compensation" and a claim for a Fifth Amendment violation is present. *Horne*, 133 S. Ct. at 2062 n.6.

Yet, *Williamson County* (supposedly) demands that courts ignore the violation of Ms. Knick's constitutional rights until she takes the time-consuming and expensive step of prosecuting a state court suit. While this requirement cannot make the takings issue more concrete, it causes delay, wastes Ms. Knick's and court resources, and may ultimately prevent any hearing. All of this is occurring under a

doctrine without a compelling basis in the Constitution's "without just compensation" language or in the Court's historical precedent. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.); *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913) (rejecting a contention that the federal courts could not hear a property rights claim under the Fourteenth Amendment until the state courts had passed on the issue).

This Court should take this case to reconsider and overrule *Williamson County*'s state litigation ripeness requirement. *San Remo Hotel*, 545 U.S. at 352 ("I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts.") (Rehnquist, J. concurring). To be sure, *stare decisis* must be considered. However, this principle is weakest in the realm of constitutional interpretation. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). Moreover, stare decisis cannot immunize a particular procedural remedy "once [the procedural rule] is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great." *Swift & Co., Inc. v. Wickham*, 382 U.S. 111, 116 (1965). For this reason, this Court is willing to reconsider judicial decisions that are cumbersome in operation. *See, e.g., Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it." (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991))). *Williamson County*'s state litigation requirement clearly qualifies as an unworkable constitutional and procedural rule. As a result, *stare*

decisis does not inhibit the Court from reconsidering *Williamson County*.

II.

THERE IS DEEP CONFLICT IN THE LOWER COURTS ON THE ISSUE OF WHETHER *WILLIAMSON COUNTY*'S STATE LITIGATION DOCTRINE APPLIES TO FACIAL TAKINGS CLAIMS

Given *Williamson County*'s dramatic effects, it is not surprising that federal courts have sought exceptions to the state litigation doctrine. Yet, in so doing, they have come into conflict. *Arrigoni*, 136 S. Ct. at 1412 (Thomas, J., dissenting from denial of cert.). This case concerns the most important and intractable federal conflict: whether *Williamson County* bars facial takings claims.

Here, the Third Circuit joined a handful of other circuits in holding that *Williamson County* applies to, and bars, facial physical and regulatory takings claims. This solidifies a conflict with other circuits that have declared *Williamson County* inapplicable to facial takings claims. The Court's review is necessary to resolve the conflict. *See* Michael M. Berger, *The Ripeness Game: Why Are We Still Forced to Play?*, 30 Touro L. Rev. 297, 317 (2014) ("Until the Supreme Court steps in, there will be no uniformity.").

A. The First, Fourth, and Seventh Circuits Exempt Facial Claims from *Williamson County*

A number of circuit courts have concluded "that, *Williamson County* notwithstanding, takings plaintiffs remain free to raise facial Fifth Amendment challenges in federal courts in the first instance."

Katherine Mims Crocker, *Justifying a Prudential Solution to the* Williamson County *Ripeness Puzzle*, 49 Ga. L. Rev. 163, 186 (2014). The First Circuit is in this camp. In *Philip Morris, Inc. v. Reilly*, 312 F.3d 24 (1st Cir. 2002), that court held that a physical takings facial claim was ripe for federal adjudication on the merits without respect to state remedies. *Id.* at 30; *see also id.* 54 n.27 (Lipez, J., dissenting) (agreeing that the facial claims were ripe). The same circuit confirmed this view a few years later in *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1 (1st Cir. 2007). There, the First Circuit again considered a facial physical takings claim and it again held that since the plaintiff "is making a facial statutory challenge, its takings claim need not be brought first to a Commonwealth body, either administrative or judicial." *Id.* at 14 (citing *Suitum*, 520 U.S. at 736 n.10).

The Fourth Circuit follows the same approach. In *Clayland Farm Enterprises, LLC v. Talbot County, Md.*, 672 F. App'x 240 (4th Cir. 2016), that circuit held that *Williamson County* did not prevent immediate federal review of "a regulatory takings claim that the moratorium [on development] is facially unconstitutional." *Id.* at 243. In so doing, the court stated: "[w]hen an ordinance on its face is alleged to have effected a taking . . . the claim accrues when the ordinance interferes in a clear, concrete fashion with the property's primary use. . . . Facial takings challenges to a regulation are 'generally ripe the moment the challenged regulation or ordinance is passed . . . .'" *Id.* at 244 (quoting *Suitum*, 520 U.S. at 736 n.10). This decision built on a prior Fourth Circuit opinion which also concluded that *Williamson County*

"does not apply to facial [takings] challenges to the validity of a state regulation." *Holliday Amusement Co. v. South Carolina*, 493 F.3d 404, 407 (4th Cir. 2007).

To the same effect are decisions from the Seventh Circuit. In *Peters v. Village of Clifton*, 498 F.3d 727 (7th Cir. 2007), a physical takings case, the Seventh Circuit observed that facial takings claims are exempt from *Williamson County*'s state litigation rule. *Id.* at 732. Then, in *Muscarello v. Ogle County Bd. of Com'rs*, 610 F.3d 416, 422 (7th Cir. 2010), the same court confirmed a circuit exception "to the exhaustion requirement" for "pre-enforcement facial challenges." In the 2017 decision of *International Union of Operating Engineers Local 139 v. Schimel*, 863 F.3d 674, 678 (7th Cir. 2017), the Seventh Circuit re-confirmed and applied a *Williamson* exception for a "pre-enforcement facial challenge."

While the issue is not as developed in the Fifth and Eleventh Circuits, decisions from those jurisdictions also declare that *Williamson County* does not pertain to facial takings claims. *See Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 287 (5th Cir. 2012) ("The Supreme Court has held *Williamson County* to be inapplicable to facial challenges." (citing *Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992)); *Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach, Fla.*, 727 F.3d 1349, 1359 n.6 (11th Cir. 2013) ("*Williamson County*'s finality principles do not apply to facial claims that a given regulation is constitutionally infirm.").

B. The Third Circuit Joins the Sixth, Ninth, and Tenth Circuits in Applying *Williamson County* to Facial Takings Claims

In tension with the First, Fourth, and Seventh circuits, decisions from the Sixth, Ninth, and Tenth circuit hold that *Williamson County* applies to facial physical and regulatory takings claims. In *Wilkins v. Daniels*, 744 F.3d 409, 417 (6th Cir. 2014), for instance, the Sixth Circuit considered a physical takings claim similar to that here. The court concluded that *Williamson County*'s "second requirement—that plaintiffs must seek just compensation through state procedures—does [apply]." *Id.* at 417.

The Ninth Circuit's decisions are in accord. In the early decision of *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996), the Ninth Circuit held that "the just compensation ripeness requirement" applies to facial takings "claims premised upon the denial of a property's economically viable use." *Id.* at 407. Later, in *Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1052-54 (9th Cir. 2004), the Ninth Circuit affirmed that all facial takings claims other than those under the now-defunct "substantially advances" test are subject to *Williamson County*. Similarly, in *Surf and Sand, LLC v. City of Capitola*, 377 F. App'x 662, 664 (9th Cir. 2010), the court held that a "facial challenge to the Conversion Ordinance as a public regulatory taking was not ripe [as] Plaintiff had not sought compensation from the state as required by *Williamson County*."

The Tenth Circuit has also squarely considered the facial ripeness issue. In *Alto Eldorado Partnership v. County of Santa Fe*, 634 F.3d 1170 (10th Cir. 2011), the court considered a facial takings claim arising under *Nollan*, 483 U.S. 825, and *Dolan*, 512 U.S. 374, and levied against development permit conditions. The Tenth Circuit concluded that *Williamson County*'s state litigation principle applied to this and all facial takings claims, except those arising under the defunct "substantially advances" test. 634 F.3d at 1175-76. In so doing, the Tenth Circuit attempted to distinguish decisions from other circuits declaring that facial takings claims are not bound by *Williamson County*, including several discussed above. *Id.*

In the decision below, the Third Circuit sided with the Sixth, Ninth, and Tenth Circuits in holding that *Williamson County*'s state litigation requirement applies to basic facial takings claims, like the physical takings claim asserted by Ms. Knick. The lower court held that the only facial claims exception to *Williamson County* is for claims that do not assert a taking without just compensation at all; i.e., claims arising under the Public Use Clause of the Fifth Amendment or Due Process Clause.

The decision below thus conflicts with the decisions of the First, Fourth and Seventh Circuits and exacerbates the ongoing conflict among the courts on whether *Williamson County* applies to facial takings claims resting on modern takings tests. The split has substantial practical import. In *Williamson County*-free circuits like the First and Seventh, a property owner with a facial physical takings claim receives a prompt hearing on the merits of her

complaint. In contrast, in the Third and other circuits applying *Williamson County*, the same property owner will be kicked between federal and state courts without a hearing, with resources wasted and justice delayed or denied. David Zhou, Comment, *Rethinking the Facial Takings Claim*, 120 Yale L.J. 967, 973 (2011) ("[R]elaxed ripeness rule means that federal courts will actually have to reach the merits of some takings claims characterized as 'facial.'").

This Court should grant the Petition to resolve the conflict.

III.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN APPYING *WILLIAMSON COUNTY* TO FACIAL TAKINGS CLAIMS

The Third Circuit's treatment of facial takings claims conflicts not only with other circuit decisions, but also with this Court's takings precedent.

A. This Court's Precedent Exempts Facial Claims from *Williamson County*'s State Litigation Ripeness Doctrine

Notably, the decision at the heart of this case—*Williamson County*—did not involve a facial takings claim. It dealt solely with an as-applied claim alleging that application of a land use regulation to the particular property in that case stripped away its economic value. *Williamson County*, 473 U.S. at 176-84. Consistent with this reality, this Court's subsequent decisions recognize the potential applicability of a state litigation ripeness requirement in an *as-applied* taking case, but have never considered, much less applied, the concept in a *facial*

case. *See, e.g.*, *Keystone*, 480 U.S. at 494 (reviewing a post-*Williamson County* facial takings case filed in federal court without concern for state remedies).

Instead, this Court's post-*Williamson County* jurisprudence repeatedly states and/or demonstrates that facial takings claims ripen upon enactment of the challenged law, without regard for state procedures. *Peters v. Village of Clifton*, 498 F.3d at 732 ("[T]he Supreme Court has held that many facial challenges to legislative action authorizing a taking can be litigated immediately in federal court."); *Opulent Life Church*, 697 F.3d at 287 ("The Supreme Court has held *Williamson County* to be inapplicable to facial challenges.").

In *Suitum*, the Court observed that facial takings challenges "are generally ripe the moment the challenged regulation or ordinance is passed." 520 U.S. at 736 n.10. In *San Remo*, it stated that the plaintiffs were "never required to ripen" their facial takings claims in state court, but "could have raised [them] directly in federal court." 545 U.S. at 345-46. The Court has put these statements into practice by affording merits review to many facial takings claims that arise in federal courts without prior state court litigation. *See, e.g.*, *Hodel*, 452 U.S at 273; *Keystone*, 480 U.S. at 494.

There is a logical reason for the Court's distinction between facial and as-applied takings claims with respect to *Williamson County*'s state litigation rule: facial claimants may seek to invalidate a law that textually takes property without a compensation

guarantee, not just secure after-the-fact damages.[3] 545 U.S. at 345-46. This makes it unnecessary to require use of post-taking, state compensation procedures. *Id.*

B. The Decision Below Is Inconsistent with This Court's Jurisprudence

In tension with this Court's decisions, the decision below finds no difference between as-applied and facial takings claims when it comes to the application of *Williamson County*. The decision below holds that all takings claims are unreviewable without prior state ligation. More precisely, under the Third Circuit decision, both facial physical takings claims, such as the one Ms. Knick asserts, and "denial of all economically beneficial use" regulatory takings claims are subject to *Williamson County* and unripe without state court litigation. Ultimately, the lower court concluded that this Court has only allowed facial takings claims based on the abrogated "substantial

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[3] The invalidation remedy is possible in facial takings cases because, when the text of a law causes an immediate taking in all or almost all applications, the law's validity is conditioned upon a concurrent mechanism for compensating affected owners. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 n.21 (1984) ("To the extent that the operation of the statute provides compensation, no taking has occurred . . . ."); *Arrigoni*, 136 at 1410 (Thomas, J., dissenting from denial of certiorari) (Constitution places a just compensation condition on the exercise of the power to take property). Without a compensation guarantee in the statute, it is unlawful and the claimant may seek declaratory relief or other non-monetary remedies to invalidate the offending law. *See, e.g., Keystone*, 480 U.S. at 494 (injunctive and declaratory relief); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 71 n.15 (1978) (declaratory relief).

advances" takings test to proceed without state litigation.

This view is irreconcilable with the history of facial takings litigation in this Court. The Court has reviewed facial takings cases arising under every extant takings standard (i.e., non-"substantially advances" claims), without concern for exhaustion of state remedies. *F.C.C. v. Florida Power Corp.*, 480 U.S. 245 (1987) (facial physical takings claim); *Hodel*, 452 U.S at 273 (denial of economic use takings claim); *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224-25 (1986) (facial "*Penn Central*" regulatory takings claim). These cases confirm the Court's explicit statements in other cases that state remedies are inapplicable to facial takings claims.

The decision below, and other decisions like it, badly stray from this precedent in holding that facial claims cannot be resolved until the claimant sues in state court. Indeed, under the lower court's reasoning, few of the Court's facial takings cases were properly before the Court. The Court should clarify that this view is wrong and thereby resolve the conflict about whether facial takings claims can be adjudicated free from *Williamson County*'s state litigation requirement.

In sum, *Williamson County* can and should be reconsidered from the ground up because of clear and persistent evidence it is unworkable and wrongly decided. This case is a proper vehicle for doing so. However, if the Court is not inclined to take that step here, it should grant review to resolve the festering conflict on whether *Williamson County* applies to facial takings claims. Without this Court's intervention, *Williamson County* will continue to drag

property owners through a Kafkaesque litigation process, federal courts will continue to issue confused and conflicting rulings, and important takings controversies will disappear in *Williamson County*'s procedural black hole without a hearing.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

DATED: October, 2017.

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-3587

ROSE MARY KNICK,
Appellant
v.
TOWNSHIP OF SCOTT;
CARL S. FERRARO, Individually and in
his Official Capacity as Scott
Township Code Enforcement Officer

On Appeal from the United States District Court
for the Middle District of Pennsylvania
District Court No. 3-14-cv-02223
District Judge: The Honorable A. Richard Caputo

Argued April 25, 2017

Before: SMITH, *Chief Judge*,
McKEE, and RENDELL,
Circuit Judges

(Filed: July 6, 2017)

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OPINION

SMITH, *Chief Judge.*

On December 20, 2012, the Township of Scott in Lackawanna County, Pennsylvania enacted an ordinance regulating cemeteries. The ordinance authorizes officials to enter upon any property within the Township to determine the existence and location of any cemetery. The ordinance also compels property owners to hold their private cemeteries open to the public during daylight hours. The plaintiff, Rose Mary Knick, challenges the ordinance on two grounds. First, Knick argues that the ordinance authorizes unrestrained searches of private property in violation of the Fourth Amendment. Second, Knick argues that the ordinance takes private property without just compensation in violation of the Fifth Amendment.

The Township's ordinance is extraordinary and constitutionally suspect. However, important justiciability considerations preclude us from reaching the merits. Because Knick concedes that her Fourth Amendment rights were not violated and fails to demonstrate that they imminently will be, Knick lacks standing to advance her Fourth Amendment challenge. And as the District Court correctly held, Knick's Fifth Amendment claims are not ripe until she has sought and been denied just compensation using Pennsylvania's inverse condemnation procedures, as required by the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). We will therefore affirm.

I

On December 20, 2012, the Township of Scott enacted Ordinance No. 12-12-20-001, titled "Ordinance of the Township of Scott Township [sic], Lackawanna County, Pennsylvania, Relating to the Operation and Maintenance of Cemeteries and Burial Places" (hereinafter, the "Ordinance"). App. 82. The Ordinance applies to "[a]ll cemeteries, whether private or public, and whether existing or established prior to the date of this Ordinance or hereafter created." *Id.* It requires cemetery owners to "properly maintain and upkeep any cemetery." App. 83.

Critical to this case are two provisions of the Ordinance. First, it requires that "[a]ll cemeteries within the Township shall be kept open and accessible to the general public during daylight hours. No owner . . . shall unreasonably restrict access to the general public nor shall any fee for access be charged." *Id.* We will refer to this as the "public-access provision."

Second, the Ordinance permits the Township's "Code Enforcement Officer and/or his/her agents and representatives [to] enter upon any property within the Township for the purposes of determining the existence of and location of any cemetery, in order to ensure compliance with the terms and provisions of this Ordinance." *Id.* We will refer to this as the "inspection provision."

Anyone who violates the Ordinance is subject to a fine of between $300 and $600, and "[e]ach day that the violation exists shall constitute a separate offense." *Id.*

On April 10, 2013, the Township Code Enforcement Officer, Carl S. Ferraro, entered Knick's property without an administrative warrant. Ferraro identified certain stones on Knick's property as grave markers and issued a Notice of Violation dated April 11, 2013. Knick disputes that a cemetery exists on her property.

On May 7, 2013, Knick brought suit against the Township in the Lackawanna County Court of Common Pleas seeking declaratory and injunctive relief. Knick filed an Emergency Motion for Injunctive Relief on or about that same date. The parties stipulated that the Township would withdraw its Notice of Violation and further stipulated to an order staying any enforcement actions against Knick. A hearing was held on October 8, 2014. Then, on October 21, the Court ruled that it "will render no decision on the matter." App. 261. Specifically, the Court ruled "that it is not the proper venue for this matter, since the case is not in the proper posture for a decision to be rendered on the Plaintiff's requested

forms of relief." *Id.*[1] Then, on October 31, the Township issued another Notice of Violation. Knick filed a Petition for Contempt of Court in the Lackawanna County Court of Common Pleas, which the Court denied on January 30, 2015. At no point did Knick institute an inverse-condemnation proceeding against the Township. *See* 26 Pa. Const. Stat. Ann. § 502(c).

Knick filed this action on November 20, 2014 in the United States District Court for the Middle District of Pennsylvania. In her original Complaint, Knick asserted four Counts under 42 U.S.C. § 1983: (I) Fourth Amendment claims against the Township for maintaining a warrantless inspection regime (the facial challenge) and entering Knick's property without a warrant (the as-applied challenge); (II) a Fourth Amendment claim against the Township for failure to train its officials to obtain administrative warrants; (III) Fourth and Fourteenth Amendment claims against Ferraro in his official capacity for entering Knick's property without a warrant; and (IV) claims seeking invalidation of the Ordinance on Fourth, Fifth, and Fourteenth Amendment grounds, including, *inter alia*, vagueness, improper exercise of the Township's police power, and taking private property without just compensation. After the Township filed its motion to dismiss, Knick filed an Amended Complaint, which added Count V for declaratory and injunctive relief. By Order dated

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[1] Although not apparent from the face of the Order, a subsequent state-court judge opined that "[a] reasonable interpretation" of the Order is that "Knick's constitutional challenge to the Ordinance should be litigated in any civil enforcement proceeding that may be filed by the Township." App. 192.

October 28, 2015, the District Court dismissed Counts I-III with prejudice and dismissed Counts IV and V without prejudice.

Knick filed a Second Amended Complaint on November 16, 2015. The Second Amended Complaint asserts three Counts: (I) the Fourth Amendment claims pled in Count I of the original complaint; (II) a claim that the Ordinance takes Knick's private property without just compensation, in violation of the Fourth, Fifth, and Fourteenth Amendments; and (III) claims for declaratory and injunctive relief because, *inter alia*, the Ordinance unconstitutionally takes Knick's property and authorizes unconstitutional searches. By Order dated September 7, 2016, the District Court dismissed Count I with prejudice for the reasons provided in its earlier decision and dismissed Counts II and III without prejudice pending exhaustion of state-law remedies.

This appeal timely followed. On appeal, Knick argues that the District Court erred by dismissing her Fourth Amendment facial challenge and by requiring her to exhaust state-law remedies for her takings claims.

II

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction to review "final decisions of the district courts," 28 U.S.C. § 1291, and we must assure ourselves of our jurisdiction sua sponte, *see, e.g.*, *Kreider Dairy Farms, Inc. v. Glickman*, 190 F.3d 113, 118 (3d Cir. 1999). Although the District Court dismissed Knick's Second Amended Complaint without prejudice as to certain claims, we

conclude that Knick nonetheless appealed from a final decision.

A final, appealable decision is one "by which a district court disassociates itself from a case." *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 902 (2015) (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 42 (1995)). "While decisions of the Court have accorded § 1291 a practical rather than a technical construction, the statute's core application is to rulings that terminate an action." *Id.* (citations and internal quotation marks omitted). For that reason, dismissals without prejudice are ordinarily not final; leave to amend contemplates "further proceedings in the district court as part of the same action." *Doe v. Hesketh*, 828 F.3d 159, 165 (3d Cir. 2016) (quoting *Aluminum Co. of Am. v. Beazer E., Inc.*, 124 F.3d 551, 560 (3d Cir. 1997)).

But "[e]ven dismissals without prejudice have been held to be final and appealable if they end [ ][the] suit so far as the District Court was concerned." *Id.* (alterations in original) (quoting *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 198 n.3 (3d Cir. 2001)); *see also United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949). For example, we will review a dismissal without prejudice if a plaintiff stands on the complaint rather than exercising leave to amend, *Palakovic v. Wetzel*, 854 F.3d 209, 219 (3d Cir. 2017), if a plaintiff argues that administrative exhaustion would be futile, *Ghana v. Holland*, 226 F.3d 175, 180-81 (3d Cir. 2000), or if a plaintiff's claims are "effectively barred" from being subsequently reasserted due to the running of a statute of limitations or some similar obstacle, *LNC*

Invs., LLC v. Republic Nicar., 396 F.3d 342, 346 (3d Cir. 2005).

Here, the District Court dismissed Knick's takings claim without prejudice and directed her to exhaust state remedies. The District Court did not retain jurisdiction and closed the case. Its order further specified that, following the conclusion of state proceedings, any remaining takings claims must be "re-fil[ed] . . . in federal court." App. 57. As such, "there cannot be—and, by court order, there will not be—any further proceedings in the district court as part of the same action." *Beazer E.*, 124 F.3d at 560. "[T]he district court has divested itself of [the] case entirely, regardless of the fact that claims in the case may continue to go forward in state court." *Erie Cty. Retirees Ass'n v. Cty. of Erie*, 220 F.3d 193, 202 (3d Cir. 2000). The decision in this case is therefore final "even if a similar case may be filed in the future because the dismissal was without prejudice." *Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc.*, 586 F.3d 500, 506 (7th Cir. 2009); *see also Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 385-86 (D.C. Cir. 2017); *Hitchcock v. Cumberland Univ. 403(b) DC Plan*, 851 F.3d 552, 557-58 (6th Cir. 2017); *Eastman Kodak Co. v. STWB, Inc.*, 452 F.3d 215, 219 (2d Cir. 2006) ("[A] dismissal without prejudice, absent some retention of jurisdiction, is a final decision . . . ."); *cf. Blair v. Scott Specialty Gases*, 283 F.3d 595, 602 (3d Cir. 2002) (dismissal without prejudice in favor of arbitration is appealable where the District Court did not retain jurisdiction, even though further court proceedings may ensue following arbitration).

Thus, we are satisfied that the District Court's decision is a "final" one, and we have appellate

jurisdiction under § 1291. We proceed to Knick's claims.

III

We begin with Knick's facial Fourth Amendment challenge. We conclude that she lacks Article III standing because she has failed to demonstrate an injury-in-fact and redressability.

A

The Second Amended Complaint asserts both facial and as-applied challenges to the Ordinance under the Fourth Amendment. As part of her as-applied challenge, Knick claimed to be injured by an unlawful search of her property. But the District Court ruled that the search in question was lawful, and Knick does not appeal that ruling. Although not initially raised by the parties,[2] the question before us is whether Knick may persist in her facial Fourth Amendment challenge even though her own rights were not violated. Following supplemental briefing and oral argument by the parties, we conclude that Knick has failed to carry her burden to demonstrate Article III standing to challenge the Ordinance on Fourth Amendment grounds.

"[T]he irreducible constitutional minimum of standing contains three elements": injury in fact, causation, and redressability. *Lujan v. Defs. of*

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[2] The Township did advance the curious argument that Knick's claim fails the requirements of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), because Knick failed to demonstrate a cognizable injury. But that is not a requirement unique to *Monell*; it is a general requirement of all cases and controversies under Article III of the Constitution.

Wildlife, 504 U.S. 555, 560-61 (1992). As "[t]he party invoking federal jurisdiction," Knick "bears the burden of establishing these elements." *Id.* at 561. "Plaintiffs must have standing at all stages of the litigation," and certain findings by a district court may require a subsequent reevaluation of standing. *Pub. Interest Research Grp. of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 117 (3d Cir. 1997).

The first element, injury in fact, "is often determinative." *Toll Bros. v. Twp. of Readington*, 555 F.3d 131, 138 (3d Cir. 2009). The plaintiff must demonstrate "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citations and internal quotation marks omitted). To be concrete, an injury need not be "tangible," but "it must actually exist." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548-49 (2016). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1). Generalized grievances will not suffice. *See Schuchardt v. President of the U.S.*, 839 F.3d 336, 344-45 (3d Cir. 2016) (distinguishing between generalized and widely shared grievances). Furthermore, "[a]lthough imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Lujan*, 504 U.S. at 564 n.2). If the injury is sufficient under those standards, it must also be "fairly traceable to the challenged action[] and redressable by a favorable ruling" in accordance with the remaining

two elements of standing. *Id.* (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)).

In this case, the District Court ruled that the search of Knick's property complied with the Fourth Amendment because Ferraro searched an open field. "[A]n open field, unlike the curtilage of a home, is not one of those protected areas enumerated in the Fourth Amendment." *United States v. Jones*, 565 U.S. 400, 411 (2012) (citation omitted) (citing *Oliver v. United States*, 466 U.S. 170, 176-77 (1984)). Because Knick does not challenge that ruling on appeal, she has accepted the District Court's conclusion that her Fourth Amendment rights were not violated. She has likewise accepted that her property was not even "searched" in the constitutional sense. *Id.* at 411 n.8. Even if Township officials were likely to return to the same part of Knick's property for further inspections, those would *also* be open-field searches not subject to Fourth Amendment protection. As discussed below, nothing in the record suggests that any future inspections would invade her home's curtilage.

As a result, any "injury" arising from open-field searches would not be legally protected. *See Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000) ("The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right."). Nor would that injury be redressable. If we were to enjoin the Ordinance's inspection provision today, the Township would still be able to use the open-fields doctrine to enter the part of Knick's property where a cemetery

was allegedly discovered.[3] Put differently, Knick's situation is one "for which [the Ordinance] is irrelevant"; the Ordinance does "no work" in authorizing searches that would be independently lawful under established Fourth Amendment doctrines. *Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015).

Perhaps realizing these deficiencies, Knick changed tack in her supplemental brief. Now Knick attempts to premise standing on the fact that the Ordinance may permit the Township to search the curtilage of her home—an area of her property that is protected by the Fourth Amendment. *See* Knick Supp. Br. 3 ("Knick owns property, including curtilage, subject to this provision. She has alleged the Ordinance authorizes an invasion of her property. That is enough for standing, particularly at this early stage." (citations omitted)).

There are two problems with this theory. First, simply owning property protected by the Fourth Amendment describes a generalized grievance common to all residents of the Township. *See Lujan*, 504 U.S. at 575-76. We have recognized standing to challenge government search programs that are "universal in scope," but not before ensuring that the plaintiffs' injuries were "unmistakably personal." *Schuchardt*, 839 F.3d at 346. Knick has not alleged

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[3] While an open-field search does not run afoul of the Fourth Amendment, it may still constitute trespass. *See Oliver*, 466 U.S. at 183. Knick does not argue that Ordinance allows Township officials to avoid liability for trespass. And even if it did, Knick does not argue that injury arising from a lack of trespass remedy could confer standing to mount a Fourth Amendment challenge where no Fourth Amendment injury has occurred or is imminent.

any personal harm arising from a threatened or actual curtilage search. Second, Knick cannot base standing on a future invasion of her home's curtilage without demonstrating an "actual or imminent, not conjectural and hypothetical" injury. *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). Simply owning property subject to a hypothetical search is "too speculative for Article III purposes." *Clapper*, 133 S. Ct. at 1147. *Compare id.* at 1148 (holding that plaintiffs lacked standing to bring facial Fourth Amendment challenge to a statute authorizing NSA surveillance because plaintiffs failed to demonstrate a "certainly impending" risk that their communications would be intercepted), *with Free Speech Coal., Inc. v. Att'y Gen. U.S.*, 825 F.3d 149, 166-67 (3d Cir. 2016) (holding that plaintiffs demonstrated standing to bring facial Fourth Amendment challenge where, *inter alia*, the plaintiffs incurred costs complying with a regulation that specifically targeted their type of business).[4]

Accordingly, we conclude that Knick failed to demonstrate a redressable injury-in-fact and therefore lacks standing.[5]

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[4] There is no substantively lenient standard "at this early stage" as Knick claimed. Knick Supp. Br. 3. "[E]ach element must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. As such, we simply apply the pleading standard to determine if Knick's allegations are sufficient to establish each element of standing. Even accepting Knick's allegations as true, they are insufficient for the reasons provided above.

[5] Our holding can also be understood in terms of ripeness, which "originate[s] from the same Article III requirement of a case or controversy." *Free Speech Coal.*, 825 F.3d at 167 n.15. "[I]f no injury has occurred, the plaintiff can be told either that *she*

B

In an attempt to salvage her Fourth Amendment claim, Knick argues that she has standing to assert a pure facial challenge without raising, much less proving, an accompanying as-applied challenge. Our holding, however, is rooted in time-tested principles of justiciability, not in any special attribute of facial or as-applied challenges. As courts and commentators have recognized, those labels often introduce confusion, and "the distinction . . . is not so well defined that it has some automatic effect." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010); *see* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1336 (2000) [hereinafter Fallon, *As-Applied and Facial Challenges*] (arguing that facial and as-applied challenges are not "sharply categorically distinct"). Nonetheless, there are several points about the interaction between those concepts that we must clarify.

As a general matter, Knick's argument is correct: there is no requirement that a facial challenge be accompanied by an as-applied challenge. *See, e.g.*,

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cannot sue, or that she cannot sue *yet*." *Id.* (quoting *Presbytery of New Jersey of Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1462 (3d Cir. 1994)). If Knick or any other resident of the Township can demonstrate a cognizable injury arising from a search independently authorized by the Ordinance, such as a curtilage search, then the Ordinance may be ripe for judicial review. Once such a claim is properly presented, the Ordinance cannot be upheld on the ground that individual searches might be "conducted under an exception to the warrant requirement[] or pursuant to a warrant itself," because those scenarios are "irrelevant to our analysis of a statute's facial validity." *Id.* at 168 (citing *Patel*, 135 S. Ct. at 2451).

Patel, 135 S. Ct. 2443. Litigants with standing to challenge a law have considerable "flexibility . . . to shape the issues in litigation." Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 Cal. L. Rev. 915, 947 (2011) [hereinafter Fallon, *Fact and Fiction*]. Litigants may argue that the law cannot be constitutionally applied to them due to some particular set of facts or circumstances (an as-applied challenge), that the law is unconstitutional in every application, including their own (a facial challenge), or both.[6]

However, even if a litigant does not allege a violation *as* applied, the law in question must still typically *be* applied—or at least be at risk of imminent application. That is because plaintiffs must always demonstrate the "irreducible constitutional minimum" of Article III standing. *Lujan*, 504 U.S. at 560. Facial challenges are no exception. *See Williams v. Lew*, 819 F.3d 466, 476 (D.C. Cir. 2016). Furthermore, as prudential matter, a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). That prudential rule is relaxed in certain doctrinal contexts, most notably in First Amendment

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[6] *See United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010) (defining as-applied challenges as those that "contend that a law['s] . . . application to a particular person under particular circumstances deprived that person of a constitutional right"); *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 308 n.11 (3d Cir. 2007) (defining facial challenges as those brought by "a single party [who] asserts that a law is invalid *not only* as applied to them, but as applied to all parties that might come before the court" (emphasis added)).

claims.[7] *See Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973); *Osediacz v. City of Cranston*, 414 F.3d 136, 140-41 (1st Cir. 2005); *see also Pa. Prison Soc'y v. Cortés*, 508 F.3d 156, 168-69 (3d Cir. 2007) (declining to extend the solicitude shown in the "highly exceptional First Amendment context" to facial challenges raised under the Ex Post Facto and Due Process clauses).

Plaintiffs with standing to challenge a law may assert solely facial challenges, but in doing so they accept a higher substantive burden. As the Supreme Court has repeatedly intoned, facial challenges are "the most difficult . . . to mount successfully" because the challenger "must establish that no set of circumstances exist under which the [statute] would be valid." *Patel*, 135 S. Ct. at 2449, 2450 (alterations in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).[8] The Supreme Court has repeatedly

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[7] The solicitude shown to First Amendment rights is likely inapplicable in the Fourth Amendment context. It is well established that "Fourth Amendment rights are personal rights . . . which may not be vicariously asserted." *Schuchardt*, 839 F.3d at 346 (alteration in original) (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)). Thus, if Knick attempted to base standing on the Fourth Amendment rights of hypothetical third parties, standing would be strongly disfavored for prudential reasons even if she suffered a cognizable injury-in-fact. *Cf. Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 69 (1974) (holding that a bank could not assert the Fourth Amendment rights of its customers). Knick wisely does not invoke third-party standing here.

[8] We note that "some Members of the [Supreme] Court have criticized the *Salerno* formulation," *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008), but the Supreme Court recently reaffirmed that *Salerno* applies at least in the Fourth Amendment context, *Patel*, 135 S. Ct. at 2450.

discouraged litigants from asserting facial challenges—particularly where surveying the full range of possible applications is made difficult by a barebones record or a need for technical expertise. *See, e.g., Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008) (noting that facial challenges are disfavored because, in part, they "threaten to short circuit the democratic process"); *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (noting that facial challenges to an abortion-related law "should not have been entertained in the first instance," and instead should have been presented as "preenforcement, as-applied challenges" so that the Court could better assess "the nature of the medical risk" alleged); *Sabri v. United States*, 541 U.S. 600, 608-10 (2004) (noting that "facial challenges are best when infrequent" because "they invite judgments on fact-poor records" and "depart[] from the norms of adjudication in federal courts").

If a litigant decides to bring both types of challenge, a court's ruling on one might affect the other. For example, ruling that a law is facially invalid "negates any need" to address an as-applied challenge. *Heffner v. Murphy*, 745 F.3d 56, 65 n.7 (3d Cir. 2014). But if a litigant loses an as-applied challenge because the court rules as a matter of law that the statute or ordinance was constitutionally applied to her, it follows *a fortiori* that the law is not unconstitutional in all applications. *Dickerson v. Napolitano*, 604 F.3d 732, 741 (2d Cir. 2010); *see also Cty. Court of Ulster Cty. v. Allen*, 442 U.S. 140, 154-56 (1979) (holding that criminal defendants could not mount a facial challenge to a statute that had been constitutionally applied at their trial); *United States v. Raines*, 362 U.S. 17, 24-25 (1960); *Woollard v.*

claims.[7] *See Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973); *Osediacz v. City of Cranston*, 414 F.3d 136, 140-41 (1st Cir. 2005); *see also Pa. Prison Soc'y v. Cortés*, 508 F.3d 156, 168-69 (3d Cir. 2007) (declining to extend the solicitude shown in the "highly exceptional First Amendment context" to facial challenges raised under the Ex Post Facto and Due Process clauses).

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[7] The solicitude shown to First Amendment rights is likely inapplicable in the Fourth Amendment context. It is well established that "Fourth Amendment rights are personal rights . . . which may not be vicariously asserted." *Schuchardt*, 839 F.3d at 346 (alteration in original) (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)). Thus, if Knick attempted to base standing on the Fourth Amendment rights of hypothetical third parties, standing would be strongly disfavored for prudential reasons even if she suffered a cognizable injury-in-fact. *Cf. Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 69 (1974) (holding that a bank could not assert the Fourth Amendment rights of its customers). Knick wisely does not invoke third-party standing here.

[8] We note that "some Members of the [Supreme] Court have criticized the *Salerno* formulation," *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008), but the Supreme Court recently reaffirmed that *Salerno* applies at least in the Fourth Amendment context, *Patel*, 135 S. Ct. at 2450.

discouraged litigants from asserting facial challenges—particularly where surveying the full range of possible applications is made difficult by a barebones record or a need for technical expertise. *See, e.g., Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008) (noting that facial challenges are disfavored because, in part, they "threaten to short circuit the democratic process"); *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (noting that facial challenges to an abortion-related law "should not have been entertained in the first instance," and instead should have been presented as "preenforcement, as-applied challenges" so that the Court could better assess "the nature of the medical risk" alleged); *Sabri v. United States*, 541 U.S. 600, 608-10 (2004) (noting that "facial challenges are best when infrequent" because "they invite judgments on fact-poor records" and "depart[] from the norms of adjudication in federal courts").

If a litigant decides to bring both types of challenge, a court's ruling on one might affect the other. For example, ruling that a law is facially invalid "negates any need" to address an as-applied challenge. *Heffner v. Murphy*, 745 F.3d 56, 65 n.7 (3d Cir. 2014). But if a litigant loses an as-applied challenge because the court rules as a matter of law that the statute or ordinance was constitutionally applied to her, it follows *a fortiori* that the law is not unconstitutional in all applications. *Dickerson v. Napolitano*, 604 F.3d 732, 741 (2d Cir. 2010); *see also Cty. Court of Ulster Cty. v. Allen*, 442 U.S. 140, 154-56 (1979) (holding that criminal defendants could not mount a facial challenge to a statute that had been constitutionally applied at their trial); *United States v. Raines*, 362 U.S. 17, 24-25 (1960); *Woollard v.*

Gallagher, 712 F.3d 865, 882-83 (4th Cir. 2013); *Mosby v. Ligon*, 418 F.3d 927, 933 (8th Cir. 2005). If the litigant loses an as-applied challenge because the law was not in fact applied, or the law did no work in authorizing the Government's challenged conduct, then courts should be careful to ensure that any remaining challenges are justiciable. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 569 (2011) (noting that, in *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32, 40-41 (1999), a facial challenge was unavailable because "the plaintiff had not suffered a personal First Amendment injury and could prevail only by invoking the rights of others").

On the other hand, there are situations where a failure on one claim might not preclude success on the other. If a litigant loses an as-applied challenge because the allegedly unconstitutional circumstances of enforcement are simply "not supported by [the] record," *Heffner*, 745 F.3d at 65 n.7, and the litigant otherwise has standing to challenge a law (such as a defendant in an enforcement action), then "a court cannot simply refuse to address a facial challenge that offers a defendant her last chance to argue that the statute being enforced against her is constitutionally invalid." Fallon, *Fact and Fiction* at 963. And of course, a litigant who fails to prove that a law is unconstitutional in *all* applications might still prove that it was applied unconstitutionally to her. *Cf. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016) (holding that losing earlier pre-enforcement facial challenge did not preclude post-enforcement as-applied challenge).

A recent illustration of these principles is *Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), where the Supreme Court approved of a standalone facial challenge arising under the Fourth Amendment. *Patel* involved an ordinance that authorized law enforcement officials to search hotel registries without an administrative warrant. Several hotel operators sued, claiming that the ordinance was facially invalid. In *Patel*, the challenged ordinance had been, and would have continued to be, applied against the hotels to authorize warrantless searches. The parties stipulated as much, satisfying the imminence requirement. *Id.* at 2448. Thus, the plaintiffs presented a dispute about whether their rights would be violated as a function of the ordinance's facial validity. Similarly, in our recent decision in *Free Speech Coalition*, the plaintiffs demonstrated an imminent risk that they would be subjected to an allegedly unconstitutional inspection regime. 825 F.3d at 166-67. Their rights likewise turned on the facial validity of the law in question.

Not so here. Knick makes no reasonable allegation that her Fourth Amendment rights (or anyone else's) were, or will imminently be, violated. The fact that Knick challenges the Ordinance on its face does not relieve her from that fundamental burden.

* * *

We recognize that the Ordinance's inspection provision "is constitutionally suspect and we encourage the [Township] to abandon it (or, at least, to modify it substantially)." *Osediacz*, 414 F.3d at 143. It is difficult to imagine a broader authorization to

conduct searches of privately owned property.[9] But we are not a "roving commission[] assigned to pass judgment on the validity of the Nation's laws." *Broadrick*, 413 U.S. at 611. We cannot adjudicate the merits of the inspection provision without a plaintiff who has a cognizable interest in the outcome. Accordingly, we will affirm the dismissal of Knick's remaining Fourth Amendment claim on the alternative ground that Knick lacks standing.

IV

We turn then to Knick's Fifth Amendment takings claims. Knick argues that the Ordinance effectuates an uncompensated taking of her private property by requiring her to hold her land open to the public and to Township inspectors.

Before a takings claim is ripe, plaintiffs should (subject to certain exceptions) comply with two prudential requirements set forth in the Supreme Court's decision *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). First, the "finality rule" requires that the government "has reached a final decision regarding the application of the regulation to the property at issue." *Id.* at 186. Second, the plaintiff must seek and be denied just compensation using the

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[9] Knick asserted before the District Court that the Ordinance was enacted in retaliation for her repeated confrontations with Township Supervisors over their management decisions. The District Court dismissed this retaliation claim, and Knick has not appealed that ruling.

state's procedures, provided those procedures are adequate. *Id.* at 194.[10]

In this case, the Township argues that Knick failed to comply with the second *Williamson County* prong, exhaustion of state-law compensation remedies, because Knick did not pursue inverse-condemnation proceedings under Pennsylvania's Eminent Domain Code, 26 Pa. Cons. Stat. Ann. §§ 101 et seq. *See Cowell v. Palmer Twp.*, 263 F.3d 286, 291 (3d Cir. 2001) (holding that plaintiffs' takings claim was not ripe because they did not file an inverse-condemnation petition). Knick responds that she was not required to pursue inverse-condemnation proceedings for three reasons. First, Knick argues that her facial takings claim is exempt from exhaustion. Second, Knick argues that she did in fact comply with *Williamson County* by unsuccessfully suing for declaratory and injunctive relief in state court. And third, Knick argues that we should overlook *Williamson County*'s prudential requirements in the interest of efficiency. We reject all three arguments.

A

First, Knick argues that her facial takings claim need not be exhausted through state-court procedures. Specifically, Knick asserts that this Court wrongly decided *County Concrete Corp. v. Town of*

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[10] As a general matter, "there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action." *Cty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 168 (3d Cir. 2006) (quoting *Williamson Cty.*, 473 U.S. at 192). *Williamson County*'s second prong therefore is not a "true" exhaustion requirement, but "merely addresses a unique aspect of Just Compensation Takings claims." *Id.*

Roxbury, 442 F.3d 159 (3d Cir. 2006), the case relied upon by the District Court, which required exhaustion for a similar facial claim. We cannot overrule our own precedent, but we nonetheless conclude that Knick's argument is misplaced.

There is no question that the first prong of *Williamson County*, the finality rule, does not apply to "a claim that the mere enactment of a regulation . . . constitutes a taking without just compensation." *Id.* at 164. That exception to the finality rule makes sense: if the mere enactment of the ordinance constitutes a taking, there would be no need to wait for any "final decision." *See CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 626-27 (3d Cir. 2013).

The question before us is whether facial claims are also exempt from the second prong of *Williamson County*, the exhaustion of state-law compensation remedies. In *County Concrete*, this Court held that "a *facial* Just Compensation Takings claim . . . does not relieve [plaintiffs] from the duty to seek just compensation from the state." 442 F.3d at 168. The District Court correctly applied that holding here.

Knick argues, however, that our decision in *County Concrete* is contrary to Supreme Court authority. For example, in *San Remo Hotel, L.P. v. San Francisco*, the Supreme Court stated that the petitioners "have overstated the reach of *Williamson County* throughout this litigation" because the petitioners were "never required to ripen" their facial claims. 545 U.S. 323, 345 (2005). Similarly, in *Suitum v. Tahoe Regional Planning Agency*, the Supreme Court noted that facial challenges "are generally ripe the moment the challenged regulation or ordinance is

passed." 520 U.S. 725, 736 n.10 (1997); *see also Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992).

We clarify that there is no conflict between these lines of authority and that *Williamson County*'s second prong is applicable to this case.

1

This "seeming inconsistency" in the law arises because the Supreme Court has used the word "facial" in two ways. *Sinclair Oil Corp. v. Cty. of Santa Barbara*, 96 F.3d 401, 406 (9th Cir. 1996). First, the Supreme Court has referred to a type of taking as "facial"—where "the mere enactment of a statute constitutes a taking." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987). Second, the Supreme Court has used the word "facial" to refer to a type of legal challenge that seeks to invalidate a taking rather than obtain just compensation. *See Yee*, 503 U.S. at 534 (describing a facial challenge as one that "does not depend on the extent to which petitioners are . . . compensated"). These two uses of the term "facial" are conceptually distinct.

Regarding the first use—"facial taking"—it is important to understand that the government does not violate the Fifth Amendment simply because one of its actions "constitutes a taking." *Bituminous Coal*, 480 U.S. at 494. The Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power": the provision of just compensation. *First English Evangelical Lutheran Church of Glendale v. Cty. of L.A.*, 482 U.S. 304, 314 (1987); *see Cty. Concrete*, 442 F.3d at 168 ("[T]he Fifth Amendment bars not just the taking of property, but the taking of property without

just compensation." (internal quotation marks omitted)). Thus, "even if a zoning ordinance, on its face, 'takes' property for Fifth Amendment purposes, no constitutional violation occurs until the state refuses to justly compensate the property owner." *Sinclair Oil*, 96 F.3d at 406. Accordingly, a facial taking is not automatically unconstitutional; it simply "gives rise to an unqualified constitutional obligation to compensate" the property owner. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320 (2002).

The second use—"facial challenge"—describes a type of claim, not a type of taking. A plaintiff who brings a facial challenge attacks the "underlying validity" of a law or regulation that allegedly effectuates a taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005). "No amount of compensation can authorize" a taking rooted in a facially invalid law. *Id.* When a party challenges the fundamental validity of a law, the claim turns on an issue that arises logically and temporally prior to the denial of compensation. As such, there is no reason to wait for compensation to be denied; the constitutional violation would occur at the moment the invalid statute or regulation becomes effective.

This distinction between the facial takings and facial challenges explains how our decision in *County Concrete* is fully compatible with the Supreme Court's statements in *San Remo Hotel*, *Suitum*, and *Yee*. Those Supreme Court cases each describe a facial challenge. *See, e.g.*, *San Remo Hotel*, 545 U.S. at 345-46 (noting that the plaintiffs "requested relief distinct from the provision of 'just compensation'"). The Court was discussing a now-defunct legal theory: the claim

that "a general zoning law to particular property effects a taking if the ordinance does not substantially advance a legitimate state interest." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). That test is no longer good law after *Lingle*, but modern plaintiffs have other tools at their disposal to challenge the underlying validity of a taking. "[I]f a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action." *Lingle*, 544 U.S. at 543.

By contrast, the Fifth Amendment claim in *County Concrete* for which this Court required exhaustion was not a facial challenge. The taking occurred on the face of an ordinance, but the plaintiff merely sought compensation. That is why this Court emphasized that the claim at issue was "a *facial Just Compensation* Takings claim." *Cty. Concrete*, 442 F.3d at 168 (second and third emphases added). The plaintiff's true facial challenges to the law—for violating Substantive Due Process and the Equal Protection Clause—were not subject to exhaustion. *Id.* at 168-69; *see Sinclair Oil*, 96 F.3d at 406 (noting that the "seeming inconsistency" should be resolved "by analyzing the type of facial taking claim at issue in a particular case").[11]

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[11] Knick further argues that *County Concrete* was overruled by *Horne v. Department of Agriculture*, which noted that "[a] 'Case' or 'Controversy' exists once the government has taken private property without paying for it" regardless of "whether an alternative remedy exists." 133 S. Ct. 2053, 2062 n.6 (2013). But there, the Supreme Court was discussing constitutional requirements under Article III, not prudential ripeness under

To summarize, a plaintiff may be excused from the first prong of *Williamson County* depending on the type of taking alleged. If the taking occurred through an exercise of discretion, the plaintiff must demonstrate that the government reached a final decision. *Williamson Cty.*, 473 U.S. at 186. But if the taking occurred on the face of a statute, ordinance, or regulation, that requirement does not apply. *Cty. Concrete*, 442 F.3d at 164-65. As for *Williamson County*'s second prong, the plaintiff may be excused from exhausting state-law remedies depending on the type of claim asserted and the form of relief appropriate for that claim. If the plaintiff's claim is based on a lack of compensation—i.e., the claim arises under the Just Compensation Clause—then the plaintiff must first seek compensation under state law (provided the state's procedures are adequate). *Id.* at 168. If instead the plaintiff challenges the underlying validity of the taking, perhaps for lacking a public purpose or for violating due process, then the denial of compensation is irrelevant to the existence of a ripe claim and *Williamson County*'s second prong is inapplicable. *Id.* at 168-69.

2

Despite their being characterized as facial challenges, Knick's claims are, unavoidably, claims

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Williamson County. *Horne* in fact reaffirmed that "a Fifth Amendment claim is premature until it is clear that the Government has both taken property *and* denied just compensation." *Id.* at 2062. The Court in *Horne* concluded that the takings claim was not premature, but only because the usual remedies had been withdrawn. Knick has not argued that remedies through inverse condemnation proceedings are unavailable.

for compensation. They are therefore subject to exhaustion under *Williamson County*.

Knick does not claim that the alleged taking violates the Public Use Clause. Furthermore, the District Court dismissed the due-process claims asserted in Knick's original complaint, and Knick does not appeal that ruling. All that remains is the allegation that the Township violated the Fifth Amendment because it took Knick's property *without compensation*. As pled in the Second Amended Complaint:

> 36. The Ordinance requires private property owners to allow the general public to enter, traverse, and occupy their private land, *without compensation*, every day of the year. As such, on its face, the Ordinance causes an unconstitutional physical invasion and taking of private property.
>
> 37. The Ordinance also causes an unconstitutional physical taking on its face in authorizing the Township's "Code Enforcement Officer and/or his/her agents and representatives" to enter, traverse and occupy private property for the purpose of determining the "existence" of any cemetery, *without any provision of compensation* to the effected owners.
>
> . . .
>
> 42. As applied to Plaintiff, the Ordinance effects an *uncompensated* physical taking of her property by requiring Plaintiff to open

> her private property to the public, on pain of civil fines and penalties.

App. 263-64 (emphases added).

To be sure, Knick's Second Amended Complaint seeks injunctive relief. But Knick has no surviving claim that the *taking itself* was invalid, apart from the fact that she has not received compensation. The remedy for an uncompensated (but otherwise valid) taking is compensation.

Knick argues that invalidation of the Ordinance is still appropriate because the Ordinance does not provide a self-contained mechanism for compensating property owners. This argument is misplaced. "[T]he Fifth Amendment [does not] require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking." *Williamson Cty.*, 473 U.S. at 194 (internal quotation marks omitted). That provision here is inverse-condemnation proceedings under Pennsylvania's Eminent Domain Code.

Accordingly, we conclude that Knick's claims arise under the Just Compensation Clause subject to exhaustion under *Williamson County* and must therefore be exhausted using inverse-condemnation proceedings.

B

Second, Knick argues that she exhausted state-law remedies because she sued unsuccessfully in state court. We disagree.

The Eminent Domain Code provides the "complete and exclusive procedure and law to govern all condemnations of property for public purposes and the assessment of damages." 26 Pa. Cons. Stat. Ann. § 102(a). Knick did not pursue the "complete and exclusive procedure" to obtain compensation, *id.*, and therefore failed to ripen her claims, *see Cowell*, 263 F.3d at 291.

Knick's state-court action only sought declaratory and injunctive relief, not compensation. As such, Knick could not have "been denied compensation" as part of that action. *Williamson Cty.*, 473 U.S. at 195; *see Bd. of Supervisors of Shenango Twp. v. McClimans*, 597 A.2d 738, 742 n.5 (Pa. Commw. Ct. 1991) ("[A]ny claim for monetary damages is not properly before this Court and must be pursued under the provisions of the Eminent Domain Code."). Furthermore, the claims for injunctive relief presented to the state court (such as Knick's due-process challenge) are no longer before us. Even if they were, they would not be subject to *Williamson County* exhaustion. *Cty. Concrete*, 442 F.3d at 168-69.[12]

Accordingly, we conclude that Knick's earlier state lawsuit did not constitute exhaustion of state-law compensation remedies for purposes of *Williamson County*'s second prong.

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[12] Knick also argues that her state-court action was proper under *Weinberg v. Comcast Cablevision of Phila., L.P.*, 759 A.2d 395 (Pa. Super. Ct. 2000). But in that case, the plaintiff claimed that a legislative act stripped access to the "elaborate procedures" in the Eminent Domain Code for assessment of damages. *Id.* at 400. Knick has not alleged that inverse-condemnation remedies are unavailable here.

C

Finally, Knick argues that *Williamson County* is a prudential doctrine, and we may therefore overlook it in appropriate cases. We decline to do so here.

Knick's initial premise is correct: *Williamson County*'s requirements are prudential. *See Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2062 (2013). But "merely because exhaustion requirements are prudential does not mean that they are without teeth. Even prudential exhaustion requirements will be excused in only a narrow set of circumstances." *Wilson v. MVM, Inc.*, 475 F.3d 166, 175 (3d Cir. 2007).

Several of our sister circuits have declined to enforce *Williamson County*'s requirements based on the equities presented in individual cases. Knick relies primarily on *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013), and its companion case *Town of Nags Head v. Toloczko*, 728 F.3d 391 (4th Cir. 2013). In *Sansotta*, the Fourth Circuit overlooked *Williamson County* because the defendant removed the action to federal court, thwarting the plaintiff's effort to exhaust. The defendant's "manipulation" provided strong equitable reasons to overlook exhaustion. *Sansotta*, 724 F.3d at 545; *see also Sherman v. Town of Chester*, 752 F.3d 554, 564 (2d Cir. 2014). In *Toloczko*, the property owner was a *defendant* in an action brought by the state to compel the demolition of their property. The property owners removed the action to federal court, and only then asserted counterclaims under the Takings Clause. The Fourth Circuit noted that, if the owner was required to go back to state court, they would have been subjected to "piecemeal litigation" in two forums at once. 728 F.3d at 399 (quoting *San Remo Hotel*, 545

U.S. at 346); *see also Horne*, 133 S. Ct. at 2063-64 (holding that petitioners could raise a takings defense in an enforcement action).

For another example, the Ninth Circuit declined to enforce *Williamson County* in *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010) (en banc). First, the Court rejected the claim on the merits, "so it would be a waste of the parties' and the courts' resources to bounce the case through more rounds of litigation." *Id.* at 1118. Second, the Court noted that "the law changed after their trip to state court," and "it is hard to see any value in forcing a second trip on them." *Id.*

Knick does not argue that inverse-condemnation proceedings would be unavailable or futile. Instead, she argues that allowing her claims to proceed would be more efficient and would avoid piecemeal litigation. But because Knick's Just Compensation Clause claims are all that remain in the case, there is no risk of piecemeal litigation comparable to *Toloczko*. Nor has Knick identified any exceptional circumstance—such as the Township thwarting her access to inverse-condemnation proceedings as in *Sansotta*, or a change in applicable law after state-court proceedings concluded as in *Guggenheim*. Even if it were more efficient to allow Knick's claims to proceed, that would be true in *any* case where a litigant asks a court to waive her failure to meet a prudential requirement.

Finally, the Ninth Circuit declined to enforce *Williamson County* because it was more efficient to simply reject the property owner's claims on the merits. *Guggenheim*, 638 F.3d at 1118; *see also MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1130 (9th Cir. 2013). While we do not rule on the

merits here, we note that Knick's claims do not suffer from any obvious infirmities that would tempt us to follow the Ninth Circuit's example. Knick relies on a straightforward application of the Supreme Court's decision in *Nollan v. California Coastal Commission*, which found it "obvious" that an easement for public access across private property constituted a permanent physical taking. 483 U.S. 825, 831 (1987); *see also Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979). The fact that the Ordinance only mandates public access during daylight hours does not change the fact that land must be accessible every day, indefinitely. *See Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 519 (2012) (noting that, in *United States v. Cress*, 243 U.S. 316 (1917), "'inevitably recurring'" flooding created a permanent condition on the land, which "gave rise to a takings claim no less valid than the claim of an owner whose land was continuously kept under water"); *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991) ("[T]he concept of permanent physical occupation does not require that in every instance the occupation be exclusive, or continuous and uninterrupted.").

In sum, even prudential requirements should not be lightly cast aside. We think there is "value in forcing a second trip" to state court here. *Guggenheim*, 638 F.3d at 1118. The Commonwealth's inverse-condemnation mechanism is better equipped to value Knick's land than the federal courts, and litigants must be incentivized to pursue relief through proper channels. Accordingly, we will affirm the District Court's order dismissing the takings claims without prejudice pending exhaustion of state-law compensation remedies.

V

For the foregoing reasons, we will affirm the judgment of the District Court.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FILED 9/8/2016

ROSE MARY KNICK, Plaintiff, v. SCOTT TOWNSHIP, Defendant.	CIVIL ACTION NO. 3:14-CV-02223 (JUDGE CAPUTO)

MEMORANDUM

Presently before the Court is a Motion to Dismiss Plaintiff Rose Mary Knick's Second Amended Complaint ("SAC," Doc. 21) filed by Defendant Scott Township. Plaintiff's SAC asserts claims for damages under 42 U.S.C. § 1983 for an unlawful search and seizure of her property in violation of the Fourth Amendment, and an unlawful physical taking of her property without just compensation in violation of the Fifth and Fourteenth Amendments. Additionally, Plaintiff seeks a declaratory judgment declaring the Scott Township Ordinance No. 12-12-20-001 unconstitutional, and a temporary restraining order as well as preliminary and permanent injunctive relief against Scott Township's enforcement of said Ordinance. Because this Court previously dismissed Plaintiff's Fourth Amendment claims, Defendant's Motion to Dismiss Plaintiff's Fourth Amendment claims will be GRANTED. Because Plaintiff's takings claims are not ripe for review in federal court,

Defendant's Motion to Dismiss Plaintiff's Fifth and Fourteenth Amendment claims will be GRANTED. Accordingly, because Plaintiff's takings claims are not ripe for review, Defendant's Motion to Dismiss Plaintiff's claims for declaratory, injunctive, and other additional relief will be GRANTED.

I. Background

The facts as set forth in Plaintiff's Complaint are as follows:

Plaintiff, Rose Mary Knick, is a resident of Scott Township, Pennsylvania. (SAC ¶ 5, Doc. 21.) Scott Township, the only defendant named in Plaintiff's SAC, is a political subdivision of the Commonwealth of Pennsylvania, organized and designated as a Township of the Second Class. (SAC ¶ 6.) Ms. Knick owns approximately 90 acres of real estate, comprised of two parcels, located at 49 Country Club Road, in Scott Township, Pennsylvania. (*Id.* ¶¶ 5, 7.) The property has been continuously owned and occupied by Ms. Knick and her family members since 1970. (*Id.* ¶ 7.) The property has been used as a primary residence, as well as farmland and grazing areas for horses, cattle and other farm animals. (*Id.*) There are "No Trespassing" signs placed at regular intervals and the property is bounded by stonewalls, fences and other boundary markers. (*Id.* ¶ 8.)

Ms. Knick frequently attends meetings of the Scott Township Board of Supervisors ("Supervisors") and regularly confronts the Supervisors and administrative officials with respect to the expenditure of funds, tax revenue issues, and municipal decisions. (*Id.* ¶ 9.)

In September 2008, at several public meetings and in response to a citizen inquiry, the Supervisors and the Township Solicitor discussed the alleged existence of an ancient burial ground on Ms. Knick's property. (*Id.* ¶ 10.) In 2008 and early 2009, Ms. Knick, as well as her counsel at the time, made a Right-to-Know request of the Supervisors. (*Id.* ¶ 11.) The request sought particulars regarding the suggestion that an ancient burial ground was on her property. (*Id.*) Ms. Knick and her counsel also advised the Supervisors that there was no designation in the chain of title to her property regarding a burial ground or cemetery and also that there was no physical evidence of the existence of a burial ground or cemetery. (*Id.*) Ms. Knick's attorney provided Scott Township, through their solicitor, a correspondence dated October 23, 2008, reiterating that there was no designation of a burial ground or cemetery in the chain of title nor any evidence of such on Ms. Knick's property. (*Id.* ¶ 13.)

In December 2012, the Supervisors enacted Ordinance No. 12-12-20-001 ("Cemetery Ordinance" or "Ordinance"). (SAC ¶ 14.) The Ordinance addresses the operation and maintenance of cemeteries and burial grounds within Scott Township. (*Id.*) The Supervisors determined that the Ordinance would be applied to Ms. Knick and her property. (*Id.* ¶ 19.)

On April 10, 2013, after a collective determination by the Supervisors, a Scott Township Code Enforcement Agent entered Ms. Knick's property without permission and without an administrative warrant. (*Id.* ¶ 20.) On April 11, 2013, Scott Township issued a Notice of Violation alleging that Ms. Knick's property was in violation of the

Ordinance. (*Id.* ¶ 21.) On or about May 7, 2013, Ms. Knick filed a complaint in the Lackawanna County Court of Common Pleas seeking declaratory and injunctive relief requesting the court: (1) declare the Ordinance unconstitutional; (2) prohibit Defendant from enforcing the Ordinance; (3) grant Ms. Knick preliminary and permanent injunctive relief; and (4) grant other appropriate relief, including attorneys' fees. (*Id.* ¶ 23.) Ms. Knick, through counsel, provided Scott Township with notice regarding the presentation of an Emergency Motion for Injunctive Relief on or about May 7, 2013. (*Id.* ¶ 24.) In response, the parties agreed and stipulated to an order that stayed enforcement proceedings against Plaintiff. (*Id.*) A hearing was subsequently held on October 8, 2014 in the Lackawanna County Court. (*Id.* ¶ 25.) Following the hearing, Judge John Braxton issued an Order concluding that the court was an improper venue because the case was "not in the proper posture for a decision to be rendered on the Plaintiff's requested forms of relief." (*Id.*) On October 31, 2014, the Supervisors issued another Notice of Violation alleging Ms. Knick's noncompliance with the Ordinance. (*Id.* ¶ 26.) Ms. Knick filed a Petition for Contempt of Court in the Lackawanna County Court of Common Pleas. (*Id.* ¶ 28.) After a hearing, Judge Terrance Nealon denied the Petition for Contempt and entered a Memorandum and Order, which effectively lifted the stay that had previously been entered. (*Id.*) The Lackawanna County Court of Common Pleas has not yet addressed Ms. Knick's request for Declaratory Relief. (*Id.*)

Ms. Knick subsequently initiated her federal action in this Court on November 20, 2014. (Pl.'s Original Compl., Doc. 1.) Ms. Knick's First Amended

Complaint sought damages under 42. U.S.C. § 1983 against Scott Township for violations of her Fourth Amendment rights, alleging the Township maintained a policy, practice, custom or procedure permitting illegal searches of private property. (Pl.'s First Am. Compl. ¶ 26, Count I, Doc. 9.) Additionally, Ms. Knick alleged that the Township failed to adequately train the Code Enforcement Official, (*id.* ¶¶ 30-33, Count II), and sought relief from the Code Enforcement Official in his official and individual capacity under § 1983, (*id.* ¶¶ 35-39, Count III.) On March 2, 2015, Defendant filed a motion to dismiss Plaintiff's First Amended Complaint. (Def.'s First Mot. to Dismiss, Doc. 10.) After considering Defendant's motion, this Court granted Defendant's motion and dismissed Counts One, Two, and Three of Plaintiff's First Amended Complaint with prejudice. (Order Granting Def.'s Mot. to Dismiss, Doc. 20.)

Ms. Knick's First Amended Complaint also claimed violations of her First, Fourth, Fifth, and Fourteenth Amendment rights under 42 U.S.C. § 1983 stemming from Scott Township's enactment of the Cemetery Ordinance (Pl.'s First Am. Compl. ¶ 41, Count IV.) Ms. Knick additionally requested a declaratory judgment declaring the Ordinance unconstitutional as well as a temporary restraining order and preliminary and permanent injunctive relief. (*Id.* ¶¶ 44-47, Count V.) After considering the parties' briefs, this Court granted Defendant's motion to dismiss Count Four without prejudice, and provided Plaintiff a twenty-one (21) day window to file an amended pleading. This Court also granted Defendant's motion to dismiss Count Five without prejudice.

Plaintiff subsequently filed a Second Amended Complaint ("SAC") within the prescribed time frame. (SAC, Doc. 21.) Defendant responded to Plaintiff's SAC by filing the pending Motion to Dismiss for failure to state a claim. (Def.'s Second Mot. to Dismiss, Doc. 22.) Plaintiff filed a Brief in Opposition to Defendant's Motion to Dismiss, (Pl.'s Br. in Opp'n, Doc. 26), and Defendant filed a Reply Brief in support of the pending Motion, (Def.'s Reply, Doc. 27.)

Plaintiff's SAC alleges Fourth, Fifth, and Fourteenth Amendment violations. (*See* SAC, Doc. 21.) However, because this Court already dismissed Plaintiff's Fourth Amendment claims with prejudice, the only live constitutional claims before the Court are Plaintiff's facial and as-applied takings claims under the Fifth and Fourteenth Amendments.[1]

II. Discussion

A. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). When considering a Rule 12(b)(6) motion, the Court's role is limited to determining if a plaintiff is entitled to offer evidence in support of her claims. *See Semerenko v. Cendant Corp.*, 223 F.3d 165, 173 (3d Cir. 2000). The Court does not consider whether a plaintiff will ultimately prevail. *Id.* A defendant bears the burden of establishing that a plaintiff's complaint fails to

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[1] In their briefs, the parties agreed that the only claims in issue in Plaintiff's SAC are the Takings Clause claims. (*See* Pl.'s Br. in Opp'n 1; Def.'s Reply 2.)

state a claim. *See Gould Elecs. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000).

A pleading that states a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The statement required by Rule 8(a)(2) must "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Detailed factual allegations are not required. *Twombly*, 550 U.S. at 555. However, mere conclusory statements will not do; "a complaint must do more than allege the plaintiff's entitlement to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). Instead, a complaint must "show" this entitlement by alleging sufficient facts. *Id.* While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009). As such, "[t]he touchstone of the pleading standard is plausability." *Bistrian v. Levi*, 696 F.3d 352, 365 (3d Cir. 2012).

The inquiry at the motion to dismiss stage is "normally broken into three parts: (1) identifying the elements of the claim, (2) reviewing the complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged." *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011).

Dismissal is appropriate only if, accepting as true all the facts alleged in the complaint, a plaintiff has not pleaded "enough facts to state a claim to relief that

is plausible on its face," *Twombly*, 550 U.S. at 570, meaning enough factual allegations "'to raise a reasonable expectation that discovery will reveal evidence of'" each necessary element. *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679.

In deciding a motion to dismiss, the Court should consider the complaint, exhibits attached to the complaint, and matters of public record. *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010) (citing *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993)). The Court may also consider "undisputedly authentic" documents when the plaintiff's claims are based on the documents and the defendant has attached copies of the documents to the motion to dismiss. *Pension Benefit Guar. Corp.*, 998 F.2d at 1196. The Court need not assume that the plaintiff can prove facts that were not alleged in the complaint, *see City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 263 & n.13 (3d Cir. 1998), or credit a complaint's "'bald assertions'" or "'legal conclusions,'" *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429-30 (3d Cir. 1997)).

B. Count I: Plaintiff's Fourth Amendment Warrantless Search Claim

Count I of Plaintiff's SAC claims Defendant violated her Fourth Amendment rights under 42 U.S.C. § 1983 by conducting a warrantless search of her property pursuant to a Township policy, practice, custom, or procedure. (SAC ¶¶ 30-31, Doc. 21.) This Court already dismissed Plaintiff's Fourth Amendment claims with prejudice. (*See* Order Granting Def.'s Mot. to Dismiss, Doc. 20.) Plaintiff acknowledged that this Court already dismissed her Fourth Amendment claims with prejudice. (*See* Pl.'s Br. in Opp'n 1 n.1.) Consequently, Defendant's Motion to Dismiss Count I of Plaintiff's SAC will be GRANTED.

C Count II: Plaintiff's Fourth Amendment Seizure and Takings Clause Claims

Count II of Plaintiff's SAC seeks relief under 42 U.S.C. § 1983, asserting that Defendant seized Plaintiff's property in violation of the Fourth Amendment and executed an uncompensated physical invasion taking in violation of the Fifth and Fourteenth Amendments. For the reasons detailed above, Plaintiff's Fourth Amendment seizure claim has already been dismissed with prejudice. (*See* Order Granting Def.'s Mot. to Dismiss, Doc. 20.) Accordingly, Defendant's Motion to Dismiss Plaintiff's Fourth Amendment seizure claim will be GRANTED.

For the reasons detailed below, Plaintiff's facial and as-applied takings claims will be dismissed without prejudice because Plaintiff failed to exhaust available state law remedies.

The Takings Clause of the Fifth Amendment, applicable to the states via the Fourteenth Amendment, prohibits the government from taking private property for public use without providing just compensation. *See Am. Express Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 370 (3d Cir. 2012). "To state a takings claim, Plaintiff must prove that (i) private property (ii) has been taken for (iii) public use (iv) without just compensation." *Unix Sys. Labs., Inc. v. Berkeley Software Design, Inc.*, 832 F. Supp. 790, 804 (D.N.J. 1993). Takings claims generally fall into two categories: physical and regulatory. *See Yee v. City of Escondito*, 503 U.S. 519, 522-23 (1982). Because Plaintiff's SAC alleges a physical invasion taking, (SAC ¶ 36, Doc. 21), this Court need not review the elements of a regulatory taking. A physical invasion taking occurs when there is either a condemnation or a physical appropriation of property. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). An ordinance therefore amounts to a physical invasion taking in violation of the Takings Clause "where government requires an owner to suffer a permanent physical invasion of her property" and fails to provide just compensation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (internal citations omitted); *see also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831-32 (1987) (holding that a physical invasion taking occurs when "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises").

1. *Williamson County* Ripeness Requirements

But before a federal court may address the merits of a Takings Clause claim, plaintiffs generally must satisfy unique ripeness requirements. *See Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 194-95 (1985). As this Court previously explained, the Takings Clause inquiry depends on whether a plaintiff asserts a facial or as-applied challenge. An as-applied challenge generally is not ripe until two prerequisites are satisfied: "(1) 'the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue' (the 'finality rule'), and (2) the plaintiff has unsuccessfully exhausted the state's procedures for seeking 'just compensation,' so long as the procedures provided by the state were adequate." *Cty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 164 (3d Cir. 2006) (citing *Williamson Cty.*, 473 U.S. at 186, 194-95 (1985)).

Unlike an as-applied challenge, a facial challenge brought under the Takings Clause need not satisfy the "finality rule." *See Cty. Concrete Corp.*, 442 F.3d at 168. However, plaintiffs asserting a facial challenge still must satisfy *Williamson County*'s "exhaustion" requirement and "seek just compensation from the state before claiming that their right to just compensation under the Fifth Amendment has been violated," so long as adequate state procedures exist. *Id.*; *see also Cowell v. Palmer Twp.*, 263 F.3d 286, 290-91 (3d Cir. 2001) (holding that Pennsylvania state law provides an adequate procedure for aggrieved parties seeking just compensation for an alleged taking). In

accordance with the *Williamson County* ripeness test, this Court is unable to reach the merits of Plaintiff's SAC at this time because Plaintiff has failed to satisfy the state procedure exhaustion requirement. Therefore, as detailed below, Plaintiff's claim is not ripe for federal review and will be dismissed without prejudice.

2. Plaintiff's Facial Challenge Does Not Satisfy the *Williamson County* Exhaustion Requirement

Plaintiff mounts both a facial and as-applied challenge to Defendant's Cemetery Ordinance, alleging that the Ordinance constitutes a physical invasion taking without just compensation in violation of the Fifth and Fourteenth Amendments. (SAC ¶ 36, Doc. 21.) Specifically, Plaintiff alleges that the Cemetery Ordinance constitutes a facial violation of the Takings Clause in two ways: (1) by authorizing the Township's agents to enter private land to determine whether a cemetery exists on that property (the "government access provision"); and (2) by authorizing the general public to enter all land subject to the Cemetery Ordinance (the "public access provision"). (*See* Pl.'s Br. in Opp'n 7, 11, Doc. 26.) Plaintiff asserts a physical taking, not a regulatory taking. (SAC ¶ 36.) Therefore, contrary to much of Defendant's Reply Brief, this Takings Clause inquiry does not turn on whether the challenged Ordinance deprives Plaintiff of "all economically beneficial use" of the property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). Rather, the question is whether a "'permanent physical occupation' of the property, by the government itself or by others," has occurred. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831-32

(1987) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982)).

However, irrespective of whether Plaintiff states plausible grounds for a physical invasion taking of her property without just compensation, this Court is unable to reach the merits of Plaintiff's claim because Plaintiff failed to satisfy the *Williamson County* exhaustion requirement. The Third Circuit has clearly ruled that plaintiffs asserting either a facial or as-applied Just Compensation claim against a state or local government in federal court have a "duty to seek compensation from the state before claiming that their right to just compensation under the Fifth Amendment has been violated," so long as adequate state procedures exist for pursuing just compensation. *Cty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 168 (3d Cir. 2006); *see also Sinclair Oil Corp. v. Cty. of Santa Barbara*, 96 F.3d 401, 406 (9th Cir. 1996) ("Thus, even if a zoning ordinance, on its face, 'takes' property for Fifth Amendment purposes, no constitutional violation occurs until the state refuses to justly compensate the property owner. Indeed, we have found that landowners who assert their property has been *physically* taken must first seek compensation from the state before turning to a federal forum.") (emphasis in original); *Unix Sys. Labs., Inc. v. Berkeley Software Design, Inc.*, 832 F. Supp. 790, 806 (D.N.J. 1993) ("[U]ntil a plaintiff has sought just compensation, there is no case or controversy. 'Where just compensation is available, a taking is not unconstitutional.' Thus, until a plaintiff has availed itself of a state's 'adequate process for obtaining compensation,' the plaintiff has suffered no harm and has no federal cause of action.") (citations omitted).

Pennsylvania state law provides for a process "through which a landowner may seek just compensation for the taking of property." *Cowell v. Palmer Twp.*, 263 F.3d 286, 290 (3d Cir. 2001) (citing Pennsylvania's Eminent Domain Code); *see also Gould v. Council of Bristol Borough*, 2014 WL 296944, at *7 (E.D. Pa. Jan. 27, 2014) (holding that plaintiff could not pursue a Takings Clause claim until he first pursued the state law remedy contained in Pennsylvania's Eminent Domain Code); *cf. Kruse v. Vill. of Chagrin Falls*, 74 F.3d 694 (6th Cir. 1996) (permitting relief in federal court because, *inter alia*, state law failed to provide an adequate procedure for securing just compensation). The Third Circuit has concluded that the just compensation procedure contained in Pennsylvania's Eminent Domain Code is constitutionally adequate. *See Cowell*, 263 F.3d at 290; *Tripodi v. N. Coventry Twp.*, 2013 WL 4034372, at *9 (E.D. Pa. Aug. 8, 2013) ("The Third Circuit Court of Appeals has deemed exhaustion of these [Pennsylvania state law] procedures a prerequisite to filing a federal claim alleging a taking without just compensation.") (citing *Cowell*). Accordingly, Plaintiff is required to first exhaust the available state procedure for obtaining just compensation before her claim may be heard in federal court.[2]

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[2] Plaintiff brought her Takings Clause claims under 42 U.S.C. § 1983, which generally does not require a plaintiff to exhaust administrative remedies before bringing suit. *See Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192 (1985) (citing *Patsy v. Fla. Bd. of Regents*, 457 U.S. 496 (1982)). However, the Third Circuit has explained that "the second prong of *Williamson*'s ripeness test merely addresses a unique aspect of Just Compensation Takings claims," and is not a "true 'exhaustion of state remedies' requirement." *Cty. Concrete Corp.*,

Because Pennsylvania law provides aggrieved parties with an adequate procedure for obtaining just compensation, Plaintiff's takings claims are ripe for review in federal court only if she first attempts to avail herself of the state's just compensation determination process. However, Plaintiff has not pursued the state's procedures for obtaining just compensation. Although Plaintiff did file a state court action prior to her current federal lawsuit, the state court action did not petition the court to initiate the process for ascertaining and awarding just compensation per the Pennsylvania Eminent Domain Code. *See* 26 PA. CONS.. STAT. ANN. §§ 101-1106. Specifically, Plaintiff's state court claims never requested "the appointment of viewers to ascertain just compensation," *id.* § 502(6), and the record does not show any state court order granting or denying Plaintiff's petition for the appointment of viewers, *see id.* §§ 502(c)(1)-(2). Although Plaintiff's original state court complaint generally alleged a takings claim (among other claims), nothing in the record demonstrates, and Plaintiff does not contend in her SAC, that she first pursued the available state law just compensation recourse before turning to the federal courts. *Cf., e.g., In re Property Along Pine Road in Early Twp.*, 743 A.2d 990 (Pa. Commonw. 1999) (plaintiffs alleging an uncompensated taking specifically requested the appointment of viewers, per the Pennsylvania Eminent Domain Code); *Gross v. City of Pittsburgh*, 741 A.2d 234 (Pa. Commonw. 1999) (same). Because both a facial and as-applied Takings

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442 F.3d at 168. Accordingly, asserting a Takings Clause claim under § 1983 does not circumvent the need to satisfy the second prong of *Williamson County*'s ripeness test.

Clause claim does not present a "case or controversy" unless and until a "plaintiff has sought and been denied just compensation," the federal court system is unable to address Ms. Knick's takings claim until she first attempts to secure just compensation from the state via Pennsylvania's Eminent Domain Code. *See Unix Sys. Labs., Inc. v. Berkeley Software Design, Inc.*, 832 F. Supp. 790, 806 (D.N.J. 1993); *id.* at 807 ("Plaintiff's takings claim will not be ripe until Plaintiff has sought just compensation in state court."). Accordingly, Defendant's Motion to Dismiss Count II of Plaintiff's SAC will be GRANTED because the takings claims are not ripe for review in federal court. Plaintiff's Fifth and Fourteenth Amendment claims will be dismissed without prejudice.

D. Count III: Plaintiff's Request for a Declaratory Judgment and Injunctive Relief

Count III of Plaintiff's SAC requests a declaratory judgment declaring the Cemetery Ordinance unconstitutional, as well as a temporary restraining order and preliminary and permanent injunctive relief prohibiting Defendant from enforcing the Ordinance. (SAC ¶¶ 45-53, Doc. 21.). This Court previously denied Plaintiff's request for this particular relief. (*See* Order Granting Def.'s Mot. to Dismiss, Doc. 20.) Because the takings claims now before the Court are not ripe for review, this Court will decline to issue declaratory and/or injunctive relief. *See Carteret Sav. Bank, F.A. v. Office of Thrift Supervision*, 963 F.2d 567, 582-84 (3d Cir. 1992) (concluding that a plaintiff generally cannot receive equitable relief for a takings claim so long as an adequate procedure exists for awarding just

compensation); *Unix Sys. Labs., Inc. v. Berkeley Software Design, Inc.*, 832 F. Supp. 790, 806 (D.N.J. 1993) ("[T]he federal takings cases and *Williamson* teach that a plaintiff cannot bring a takings claim in federal district court, *whether for injunctive relief or damages*, until the plaintiff has sought and been denied just compensation . . . . [U]ntil a plaintiff has sought just compensation, *there is no case or controversy*.") (emphases added); *CBS Outdoor Inc. v. N.J. Transit Corp.*, 2007 WL 2509633, *12 (D.N.J. Aug. 30, 2007) ("Plaintiffs cannot avoid *Williamson*'s exhaustion of state procedures requirement by declining to categorize their claims as ones for just compensation. The Takings Clause primarily concerns itself with ensuring just compensation and is not violated until just compensation is denied. Plaintiffs also cannot utilize the Declaratory Judgment Act to backdoor their takings claim into federal court without first complying with the Supreme Court's directives and utilizing state compensatory procedures."). Accordingly, Defendant's Motion to Dismiss Count III of Plaintiff's SAC will be GRANTED. Plaintiff's claims in Count III will be dismissed without prejudice.

III. Conclusion

For the above stated reasons, Plaintiff's Fourth Amendment claims against Defendant contained in Counts I and II will be DISMISSED with prejudice. Plaintiff's takings claims under the Fifth and Fourteenth Amendments contained in Count II will be DISMISSED without prejudice. Plaintiff must first attempt to avail herself of Pennsylvania's just compensation procedures before she may re-file these takings claims in federal court. Plaintiff's claims for

declaratory and injunctive relief contained in Count III will be DISMISSED without prejudice.

An appropriate order follows.

September 7, 2016
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District
Judge

Appendix C-1

FILED 7/6/2017

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-3587

ROSE MARY KNICK,
Appellant

v.

TOWNSHIP OF SCOTT;
CARL S. FERRARO, Individually and in his Official Capacity as Scott Township Code Enforcement Officer

On Appeal from the United States District Court
for the Middle District of Pennsylvania
District Court No. 3-14-cv-02223
District Judge: The Honorable A. Richard Caputo

Argued April 25, 2017

Before: SMITH, *Chief Judge*,
McKEE, and RENDELL, *Circuit Judges*

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was argued on April 25, 2017.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the District Court entered September 8, 2016, be and the same is hereby AFFIRMED. The parties shall bear their own costs. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Marcia M. Waldron
Clerk

DATED: July 6, 2017